Supreme Court, U.S.
FILED

02-1466 MAR 28 2003

No.

IN THE

Supreme Court of the United States

BERTRAND R. FAVREAU, II, *ET AL.*,

Petitioners,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

MICHAEL A. FELDMAN
14 Lincoln Street
Brunswick, ME 04011
(207) 729-2660

SCOTT L. NELSON
Counsel of Record
BRIAN WOLFMAN
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street, N.W.
Washington, D.C. 20009
(202) 588-7724

Attorneys for Petitioners

March 28, 2003

57 pp

QUESTIONS PRESENTED

Petitioners are a class of veterans who were involuntarily separated from the armed services because they were not successful, despite good-faith efforts, in meeting applicable weight and fitness standards. The United States Court of Appeals for the Federal Circuit held that petitioners must refund portions of their enlistment or reenlistment bonuses to the United States under statutes providing for recoupment of bonuses from service members who "*voluntarily* ... d[o] not complete the term of enlistment for which a bonus was paid" (emphasis added). The questions presented are:

1. Is a service member who is involuntarily discharged for not meeting weight and fitness standards obligated to refund an enlistment or reenlistment bonus on the ground that he or she has "voluntarily" failed to "complete the term of enlistment for which a bonus was paid" within the meaning of the governing statutes?

2. May a court disregard an agency's published regulations by (a) treating unpublished, internal agency memoranda as legally binding "regulations" whose terms prevail over the published regulations, and (b) granting *Chevron/Mead* deference to an agency's statutory construction set forth in litigation affidavits that contradict the published regulations?

RULE 14.1(b) STATEMENT

The petitioners in this Court (and plaintiffs-appellants in the court of appeals) are: Bertrand R. Favreau, II; Jeffrey D. Thompson; Donna Marie McCurdy; Ryan D. Mumme; Bridgit Hallas; Scott Laberge; Thomas L. Fryer; Lee C. Marshall; Joseph Tingerthal; James W. Fuller; Roger F. Sablone, Jr.; Robert A. Bell; Brenda G. Vanness-Crista; Patrick N. Turner; Charles D. Wiggins; and a class of others similarly situated.

The respondent in this Court (and defendant-appellee in the court of appeals) is the United States of America.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

RULE 14.1(b) STATEMENT ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

STATUTES AND REGULATIONS INVOLVED 2

STATEMENT OF THE CASE 3

A. Statutory and Regulatory Background. 3

B. This Lawsuit 5

C. The Decisions Below. 9

REASONS FOR GRANTING THE WRIT 11

I. THE OPINION BELOW CONFLICTS WITH DECISIONS OF OTHER FEDERAL COURTS THAT GIVE EFFECT TO THE PLAIN MEANING OF THE STATUTORY TERMS 12

II. THE FEDERAL CIRCUIT'S DECISION TO GIVE UNPUBLISHED MEMORANDA AND LITIGATION AFFIDAVITS PRECEDENCE OVER DULY PROMULGATED AND PUBLISHED REGULATIONS MERITS REVIEW. 15

CONCLUSION 20

APPENDIX:

A. Opinion of the Court of Appeals 1a

B. Opinion of the Court of Federal Claims (Addendum to Opinion of the Court of Appeals) 4a

C. Defense Financial Management Regulation 090503 ..... 29a

TABLE OF AUTHORITIES

Page(s)

CASES

AFGE v. Rumsfeld, 262 F.3d 649 (7th Cir. 2001).....19

Barnhart v. Walton, 535 U.S. 212 (2002).....18

Blassingame v. Secretary of the Navy, 866 F.2d 556 (2d Cir. 1989).....16

Boddie v. Department of Navy, 827 F.2d 1578 (Fed. Cir. 1987).....16

Brown v. Gardner, 513 U.S. 115 (1994).....12

Chao v. Russell P. LeFrois Builder, Inc., 291 F.3d 219 (2d Cir. 2002).....19

Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837 (1984)..... 10-11, 18, 19

Edelman v. Lynchburg College, 535 U.S. 106 (2002)..... 19-20

Favreau v. United States, 48 Fed. Cl. 774 (2000).....7

Hamlet v. United States, 63 F.3d 1097 (1995).....17

Hensala v. Department of the Air Force, 148 F. Supp. 2d 988 (N.D. Cal. 2001) 14, 15

Iliff v. Schlesinger, 539 F.2d 1275 (10th Cir. 1976) 9, 12-13

Land v. United States, 41 Fed. Cl. 695 (1998).....4

Landmark Legal Found. v. IRS, 267 F.3d 1132 (D.C. Cir. 2001) 19

Lee v. FlightSafety Services Corp., 20 F.3d 428 (11th Cir. 1994).....18

Lopez v. FAA, 318 F.3d 242 (D.C. Cir. 2003) 16

Matz v. Household Intern. Tax Reduction Inv. Plan, 265 F.3d 572 (7th Cir. 2001) 19

Morton v. Ruiz, 415 U.S. 199 (1974) 17

National Ass'n of Concerned Veterans v. Secretary of Defense, 487 F. Supp. 192 (D.D.C. 1979) 17

Service v. Dulles, 354 U.S. 363 (1957) 16

United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260 (1954) 16

United States v. Gears, 835 F. Supp. 1093 (N.D. Ind. 1993) 13

United States v. Mead Corp., 533 U.S. 218 (2001) 11, 18, 19, 20

STATUTES AND REGULATIONS

5 U.S.C. § 552(a) 17

5 U.S.C. § 553 17

10 U.S.C. § 2005(a)(3) 3, 4, 13, 14

28 U.S.C. § 1254(1) 1

37 U.S.C. § 308(d)(1) 2, 3, 4

37 U.S.C. § 308a(b) 2, 3

37 U.S.C. § 309 3

37 U.S.C. § 309 note 3

Department of Defense Financial Management Regulation 090503 ..... *passim*

S. Ct. R. 10(a) 18

LEGISLATIVE HISTORY

S. Rep. No. 96-850 (1980), *reprinted in* 1980 U.S.C.C.A.N. 2833 4

PETITION FOR A WRIT OF CERTIORARI

Petitioners, representatives of a class of veterans who were involuntarily separated from the armed services because they did not succeed in meeting weight or fitness standards, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit. The decision below holds that petitioners must reimburse the United States for portions of their enlistment or reenlistment bonuses on the ground that they "voluntarily" did "not complete the terms of [their] enlistment" within the meaning of applicable statutes. This Court should grant certiorari to review the Federal Circuit's judgment because:

(1) It conflicts with decisions of other federal courts construing the plain statutory language, which precludes recoupment unless a service member was separated voluntarily or on account of misconduct; and

(2) (a) It violates fundamental norms of administrative law by giving secret, unpublished agency memoranda precedence over an agency's published regulations implementing the statutory terms; and (b) it further departs from accepted administrative law principles set forth in this Court's decisions by giving dispositive weight to litigation affidavits contradicting the agency's published regulations.

OPINIONS BELOW

The decision of the court of appeals is published at 317 F.3d 1346 (Fed. Cir. 2002), and is reprinted in the Appendix at 1a. The decision of the Court of Federal Claims is published at 49 Fed. Cl. 635 (2001), and as an addendum to the court of appeals' opinion, 317 F.3d at 1349-62; it is reprinted in the Appendix at 4a.

JURISDICTION

The court of appeals entered judgment on December 30, 2002. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

37 U.S.C. § 308(d)(1), governing reenlistment bonuses, provides:

> A member who voluntarily, or because of his misconduct, does not complete the term of enlistment for which a bonus was paid to him under this section ... shall refund the percentage of the bonus that the unexpired part of his additional obligated service is of the total reenlistment or extension period for which the bonus was paid.

37 U.S.C. § 308a(b), governing enlistment bonuses, provided at relevant times:

> Under regulations prescribed by the Secretary of Defense ... a person who voluntarily, or because of his misconduct, does not complete the term of enlistment for which a bonus was paid to him under this section ... shall refund that percentage of the bonus that the unexpired part of his enlistment is of the total enlistment period for which the bonus was paid.

Defense Department Financial Management Regulation 090503, which is set forth more fully in the Appendix at 29a, provides in pertinent part (emphasis added):

> Reasons for Recoupment. For purpose of recouping any unearned portions of enlistment, reenlistment, or retention bonuses, the term "who voluntarily or because of misconduct" includes (but is not limited to) members separated ... (M) ... for the convenience of the government *upon the application and interest of the member* because of special or unusual circumstances including, but not limited to ... (6) Overweight/obesity or lack of physical fitness.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

To encourage talented men and women to join and remain in what are now the all-volunteer armed services of the United States, the services have long offered substantial bonus payments for enlistment and reenlistment. To remove any possible temptation to "take the money and run," statutes authorizing such bonuses and other similar incentives (such as advanced education assistance) provide that a person who "voluntarily, or because of his misconduct, does not complete the term of enlistment" for which he or she received the bonus or other incentive must refund a proportionate amount to the government. 37 U.S.C. § 308(d)(1) (reenlistment bonuses); former 37 U.S.C. § 308a(b) (enlistment bonuses)[1]; *see also, e.g.,* 10 U.S.C. § 2005(a)(3) (advanced education assistance). The statutes not only protect the government, but also assure service members who accept bonus contracts for enlisting or reenlisting that they will be entitled to keep the offered inducement as long as they do not quit or misbehave.

Because of the physical demands that the Nation's defense often places on members of the armed forces, the services also require that soldiers, sailors, airmen, and Marines meet physical standards, including fitness and weight requirements. Members who are unsuccessful in meeting fitness or weight requirements after undergoing remedial fitness or weight reduction programs may, in the discretion of the services, be involuntarily separated from the armed serv-

---

[1] Section 308a was repealed in 2000 and replaced by a new provision, 37 U.S.C. § 309, which contains identical language requiring refunds by members who "voluntarily, or because of [their] misconduct, d[o] not complete the term of enlistment." The 2000 legislation provided that the terms of § 308a would continue to govern the terms of any bonus provided thereunder for enlistments before October 1, 2000. *See* 37 U.S.C. § 309 note ("Effective and Applicability Provisions").

ices. *See, e.g., Land v. United States*, 41 Fed. Cl. 695 (1998). The interaction between the services' policy of discharging some members who fail to meet weight and fitness standards and the statutes providing for recoupment of enlistment bonuses is at the heart of this case. Whether a service member who has been *involuntarily separated* for weight or fitness reasons has "*voluntarily*" failed to "complete the term of enlistment" for which he or she received a bonus is the ultimate question posed by this case.

Since the 1950s Congress has repeatedly used the formulation "voluntarily or because of misconduct" in describing the circumstances under which bonuses or other incentives must be refunded to the government when a service member does not complete his or her full term of service. In 1980, Congress enacted legislation using the identical standard to define when a service member who left the armed forces early would have to refund the cost of advanced education (for example, attendance at medical school) received during service. *See* 10 U.S.C. § 2005(a)(3). The Senate Report on that legislation included an explanatory memorandum from the Under Secretary of the Air Force, which cited as precedent for such a refund requirement the reenlistment bonus recoupment provision found in 37 U.S.C. § 308(d)(1). S. Rep. No. 96-850 at 8 (1980), *reprinted in* 1980 U.S.C.C.A.N. 2833, 2840. The memorandum specifically stated that it was "not the intent of this proposal to include situations where an individual is discharged ... because of academic failure not deemed willful on the part of the individual, failure to meet physical standards or hardship." *Id.*

The Department of Defense implemented the enlistment bonus recoupment statutes in its Financial Management Regulations ("FMRs"), promulgated by the Under Secretary of Defense/Comptroller and Chief Financial Officer. The relevant FMR, entitled "Reasons for Recoupment," has been promulgated in substantially identical terms eight times since 1984, most recently last year. Each time the FMRs were reis-

sued, their introduction expressly stated that they "supersede existing directives on military pay entitlement."[2]

The "Reasons for Recoupment" regulation (currently numbered FMR 090503) provides a laundry list of reasons for separation that are considered "voluntar[y], or because of misconduct," including separation as a result of resignation, court martial, writ of habeas corpus, defective or fraudulent enlistment, misconduct, unsatisfactory performance, and drug or alcohol abuse. As to failure to meet weight or fitness standards, the FMR provides that a separation is voluntary when it occurs "for the convenience of the government *upon the application and interest of the member* because of special or unusual circumstances including ... [o]verweight/obesity or lack of physical fitness." FMR 090503(M)(6). In other words, the only situation in which the FMR provides that a weight or fitness separation will be considered "voluntary" for recoupment purposes is when the service member has *asked for* separation on that basis.

B. This Lawsuit

Despite the Defense Department's 1980 statement to Congress that "voluntarily or because of misconduct" does not include separations based on physical standards, and its FMR providing for recoupment only when a service member *applies for* a weight or fitness discharge, the Department has adopted a practice of recouping bonuses from members discharged honorably but involuntarily for failing to meet weight and fitness standards (despite diligent good-faith efforts to do so). The Department has carried out this practice by, among other things, setting off bonus amounts against service members' tax refunds and the pay due them on sepa-

---

[2] The most recent version of the FMR concerning recoupment is available on the internet at www.dod.mil/comptroller/fmr/07a/07A09.pdf. The most recent statement that the FMRs supersede all other directives can be found at www.dod.mil/comptroller/fmr/07a/07aintr2.pdf.

ration, requiring monthly payments, and, in some cases, employing collection agencies and reporting former service members to credit bureaus.

The named petitioners in this case are 15 men and women who were discharged by the armed services because they did not succeed, after remedial efforts, in meeting weight or fitness standards. None requested discharge, and the government has stipulated that each was involuntarily separated. All were honorably discharged, and none was found to have engaged in misconduct. Nor was any named petitioner found not to have made a good-faith effort to comply with weight or fitness standards. Indeed, the services' current policy is to discharge members who do not try to lose weight for unsatisfactory performance; a discharge for weight reasons alone thus reflects a determination that the member's effort was not unsatisfactory.[3] In short, petitioners were discharged not because they did not try, but because they did not succeed.

All of the petitioners had received enlistment or reenlistment bonuses ranging from $1,000 to $30,000. The government had recouped portions of those amounts from each of them, and, in some cases, sought interest, costs, and penalties on the amounts claimed to be due.

Certain petitioners filed this action in the United States District Court for the District of Maine on behalf of themselves and others similarly situated, seeking to recover under the Tucker Act the amounts that were recouped from them in violation of applicable statutes and regulations. Petitioners also alleged that the recoupment breached their enlistment or reenlistment contracts. The district court certified a class but, sua sponte, transferred the case to the Court of Federal Claims. There, petitioners filed an amended complaint adding new plaintiffs and again sought class certification.

---

[3] Service regulations on this point were collected in the Joint Appendix below at J.A. 495-96, 367-68, 371-73, 455-56.

On October 25, 2000, the Court of Federal Claims certified an opt-in class of service members who were or are involuntarily discharged solely for failure to meet weight or fitness standards and from whom the government has recouped (or is recouping) any bonus payments. Excluded from the class were any members whose discharge was based on a substantive finding of unsatisfactory performance. *Favreau v. United States*, 48 Fed. Cl. 774, 780 (2000). Thus, by definition, *no class member was discharged for making an insufficient effort to comply with weight or fitness standards*, and the class consists entirely of those who did not succeed despite their legitimate efforts. When certification was sought, class counsel estimated the potential size of the class to be approximately 500 members. Over 2,300 discharged veterans subsequently opted in to the class, and it appears based on discovery in the case that as many as 10,000 might be eligible to join if the case were permitted to proceed.

The parties filed cross motions for summary judgment. Petitioners relied principally on the terms of the governing statutes and the FMR. The government took the position that even though petitioners did not complete their terms of enlistment because they were *involuntarily* separated, their failure to complete their enlistment terms should nonetheless be considered "voluntary" because their underlying conduct — failure to meet weight and fitness standards — was in some sense "volitional" (even though the members made legitimate efforts to meet the standards and were not discharged for unsatisfactory effort). Thus, according to the government, petitioners' discharges should be considered to be "voluntary involuntary" separations. The government relied on affidavits from Defense Department officials explaining the Department's practice of recouping bonuses from members discharged for these reasons.

In addition, the government produced two unpublished, internal memoranda that it contended are "regulations" with the force of law that trump the terms of the published FMR

and require recoupment from members separated on weight and fitness grounds. According to the government, the terms of the published regulation were erroneous results of an "administrative oversight." Accordingly, they were to be disregarded to the extent they differed from the two secret memoranda and failed to authorize recoupment from service members involuntarily separated for weight or fitness reasons.

The first of the government's proffered memoranda, written by then-Assistant Secretary of Defense Lawrence Korb in 1983, is a directive that, in relevant part, states that "convenience of the government" is to be included among the causes of separation that give rise to recoupment. The memorandum says nothing about separation for weight or fitness reasons and thus, on its face, does not clearly contradict the FMR on benefit recoupment, which provides that "convenience of the government" separations (including weight and fitness separations) are grounds for recoupment *when a member has applied for separation.*

The second memorandum produced by the government, written by then-Assistant Secretary of Defense Christopher Jehn in March 1992, states that separation for weight control failure is to be "treated similarly for *benefit eligibility*" (emphasis added) to separation for drug and alcohol rehabilitation failure. Although drug and alcohol separations are grounds for bonus recoupment under the FMR, the Jehn memorandum addresses only benefit eligibility and says nothing about recoupment of bonuses. The FMR permitting recoupment for weight or fitness discharges only when the member has applied for discharge has been issued or reissued eight times without substantial change since the Korb memorandum and four times since the Jehn memorandum, and each time it has expressly superseded all existing directives concerning its subject matter.

C. The Decisions Below

The Court of Federal Claims granted the government's motion for summary judgment on June 28, 2001. The court acknowledged that both service usage and case law demonstrate that a voluntary separation is one initiated by a service member of his or her own free will. App. 18a-19a. (Indeed, each of the services has directives that define voluntary separations as those requested by service members, and involuntary separations as those initiated by the service commander. *See* J.A. 394-95, 402-03, 436-37, 462-63, 764-65.) Thus, the court recognized that petitioners' separations were "*not voluntary in any meaningful way.*" App. 19a (emphasis added).

The court, however, drew a distinction between the separation and the resulting failure to "complete the term of enlistment." In the court's view, the statute did not exclude the possibility that an *involuntary* separation could nonetheless give rise to a *voluntary* failure to complete the term of enlistment if "the underlying reasons prompting separation relate to acts of volition." App. 20a. Thus, the court concluded that the statutory language was "susceptible of both parties' readings, and is thus ambiguous." App. 20a. In holding that the "statutory language refers to the voluntariness of the underlying behavior and not the act of separation," the court expressly disagreed with the Tenth Circuit's reading of the bonus recoupment statutes in *Iliff v. Schlesinger*, 539 F.2d 1275 (10th Cir. 1976). App. 19a-20a n. 18.

Turning to the agency's construction of the statute, the court further rejected the petitioners' argument that the FMR — that is, the agency's published recoupment regulation — supported the view that recoupment was permissible in a weight or fitness separation only when it was the result of the service member's own application. The court held that the Korb and Jehn memoranda are binding regulations, and it accepted the government's argument that the terms of the repeatedly published FMRs amounted to a scrivener's error and could not be given effect to the extent that they differed

from the unpublished memoranda or reflected a "less-than-faithful rendition" of the memoranda. App. 16a.[4]

The court acknowledged, however, that even the Korb and Jehn memoranda (which it repeatedly mischaracterized as "regulations") do not clearly address whether bonus recoupment is permissible in weight and fitness separations — because, as noted above, the Korb memorandum says nothing about weight or fitness, and the Jehn memorandum says nothing about bonuses or recoupment. As the court put it, "by themselves the regulations are insufficient to understand the agency's interpretation." App. 20a.

Accordingly, the court placed its reliance on the affidavits submitted by the government in this case that set forth the agency's purported construction of the statutes as authorizing recoupment "if the conduct that resulted in the separation was voluntary, i.e., within the service-member's control." App. 10a.[5] Concluding that the interpretation of the statute set forth in the agency's affidavits was entitled to deference under *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837

---

[4] The court accepted the government's assertion that the FMR was drafted by the Defense Finance and Accounting Service, which lacked authority to deviate from the Korb and Jehn memoranda. App. 16a. Curiously, the court overlooked that the FMR was promulgated under the signature of the Under Secretary of Defense/Comptroller and Chief Financial Officer. Neither the court nor the government cited anything to indicate that the Under Secretary lacked authority to promulgate the FMR. Indeed, even after the Court of Federal Claims' decision asserting that the FMR was a "less-than-faithful rendition" of the Korb and Jehn memoranda, the Under Secretary again promulgated it in 2002 without material change, and again stated that it superseded all prior directives. The current Under Secretary, of course, is not a subordinate of Assistant Secretaries Korb and Jehn, who long ago left office, and any assertion that he lacks authority to promulgate the FMR is incredible.

[5] The court did not explain how a failure to satisfy weight or fitness standards despite good-faith effort was "within the service member's control" where the service member was not discharged for unsatisfactory effort and there was no evidence of lack of effort.

(1984), and *United States v. Mead Corp.*, 533 U.S. 218 (2001), the court held that the government's recoupment of bonuses from the petitioners was lawful. Ironically, the court recognized that affidavits prepared for litigation purposes are normally not entitled to deference (App. 23a), but it held that here deference was warranted in light of the fact that the Korb and Jehn memoranda, which the affidavits purported to explain, were themselves regulations — even though it had already stated that, viewed as regulations, they were insufficient to clarify the agency's view of the statute. [6]

Petitioners appealed, and, on December 30, 2002, the Court of Appeals for the Federal Circuit affirmed. After briefly reciting the facts, the court of appeals' per curiam opinion stated: "For the reasons well stated in its opinion ..., which we adopt and set out here in an attachment, the judgment of the Court of Federal Claims is affirmed." App. 3a.

REASONS FOR GRANTING THE WRIT

The reason petitioners did not complete their terms of enlistment was that they were involuntarily discharged. To say that their failure to complete their terms was "voluntary" because the services' decision to discharge them was related to conduct that was somehow "volitional" makes a mockery of the statutory language. It renders another key statutory term — "misconduct" — superfluous, because, under the lower courts' reading of the statute, any member discharged for "misconduct," which is by definition "volitional," has also "voluntarily" failed to complete his term of enlistment. In any event, petitioners' conduct was hardly "volitional":

---

[6] The court also briefly alluded to language from a 1951 Senate Report concerning an earlier version of enlistment bonus recoupment legislation, but the cited language does not specifically address the issue, and the lower courts' interpretation depends on an unwarranted inference that in using the statutory language, Congress intended to adopt a totally different formulation proposed by the Bureau of the Budget. *See* App. 24a.

The undisputed facts are that they were not discharged because they did not try to meet the services' standards, let alone because they intended to fail, but only because their failure was not the result of a medical condition. That is a far cry from a "voluntary" failure. Finally, the reading of the statute adopted below is contrary to the one piece of legislative history that directly addresses the issue and that supports the plain, common-sense reading of the statute: namely, the 1980 Senate Report, discussed above, indicating that Congress was told and understood that the statutory language does not extend to discharge for "failure to meet physical standards."

The lower courts' gross misreading of an important federal statute affecting thousands of service members itself merits review by this Court. *Cf. Brown v. Gardner*, 513 U.S. 115 (1994) (reviewing Federal Circuit's construction of veteran's benefit statute and rejecting government's interpretation as "implausible"). But more is at stake here than error correction. First, the decisions below conflict with decisions of other federal courts construing the same or related statutes. Second, and more importantly, the lower courts' decision to subordinate a clear published regulation to vague unpublished memoranda and litigation affidavits interpreting them is a clear departure from established principles of administrative law and the ordinary course of judicial proceedings.

I. THE OPINION BELOW CONFLICTS WITH DECISIONS OF OTHER FEDERAL COURTS THAT GIVE EFFECT TO THE PLAIN MEANING OF THE STATUTORY TERMS.

The Federal Circuit's rejection of petitioners' straightforward reading of the statute conflicts with decisions of three other federal courts, including another federal court of appeals. First, in *Iliff v. Schlesinger*, 539 F.2d 1275, the Tenth Circuit, in a case brought by a conscientious objector claiming his resignation was not "voluntary," rejected a reading of the recoupment statutes under which the determi-

nation of "voluntariness" turned on the volitional nature of the service member's action. Instead, the *Iliff* court — at the express urging of the government —adopted a clear and simple reading of the statute: A member "voluntarily" does not complete his or her term of enlistment *when he or she asks to be discharged*. The courts in this case expressly rejected the Tenth Circuit's reading of the statute. App. 19a-20a n.18.

Second, in *United States v. Gears*, 835 F. Supp. 1093 (N.D. Ind. 1993), the district court, in an action brought by the United States under 10 U.S.C. § 2005(a) to recover educational expenses from a Naval Academy midshipman discharged for failure to meet weight standards, rejected the government's argument that a service member "voluntarily" failed to complete a tour of duty whenever his failure to meet weight standards was "volitional in that it was not caused by disease or physical defect." *Id.* at 1098. The court reasoned:

> As to volition, the court does not believe that the statutory term "voluntarily" can be so construed. Congress plainly intended to limit the reimbursement obligation to a class of persons, and the government's interpretation would remove any such limits: only those drummed out of the service for non-volitional — involuntary — acts would be spared the reimbursement obligation. ... [T]he court believes that such a reading would cast a far wider net than is consistent with the Congressional intent evident from the plain language of [the statute].[7]

Id. The government did not appeal its loss in *Gears*.

---

[7] The *Gears* court went on to say the statute required, "at the least, either an intent to produce a separation or an awareness that a chosen course of conduct will produce such a result." *Id.* at 1099. Neither standard would permit recoupment against petitioners, as none of them intended to leave the armed services, nor was their lack of success in meeting weight or fitness requirements a "chosen course of conduct."

Third, in *Hensala v. Department of the Air Force*, 148 F. Supp. 2d 988 (N.D. Cal. 2001), the court considered an action by a discharged Air Force officer seeking to enjoin the government's decision to recoup funds expended on his medical education. The Air Force had discharged him for violating the "don't ask, don't tell" sexual orientation policy by declaring that he was a homosexual. The government contended that it was entitled to recoupment under 10 U.S.C. § 2005(a)(3) because the officer had "voluntarily" failed to complete his tour of duty.

The court held that the government's decision to seek recoupment was lawful, but *not* because the officer's declaration, which resulted in his discharge, was a volitional act. Rather, the court held that for the officer's failure to complete his term of service to be voluntary, he had to have made his declaration of homosexuality "for the purpose of obtaining separation." 148 F. Supp. 2d at 998. The court then concluded that the Air Force's determination that the officer had "decided not to serve" and made his declaration in order to bring about his own discharge was supported by the record. *Id.* at 999. By contrast, under the standard adopted by the *Hensala* court, none of the petitioners in this case could be found to have voluntarily failed to complete his or her term of enlistment, because none took action for the purpose of bringing about his or her discharge. Indeed, the class in this case excludes any service member who was determined to have made insufficient effort to meet standards and was discharged for substantive unsatisfactory performance; hence, the military itself has determined that petitioners did not deliberately bring about their own separation.

These divergent readings of the same or identical statutory language not only underscore the incorrectness of the decision below, but also show a need for direction from this Court concerning the meaning of statutes that are important to the armed services and also affect the vital interests of thousands of men and women who have served or are serving

our country in the military. The decisions also demonstrate that this case, unlike many cases within the Federal Circuit's jurisdiction, is not one where the Federal Circuit effectively has the last word, rendering conflicts among the courts impossible. Rather, in cases concerning these statutes, the Federal Circuit has appellate jurisdiction only when former service members bring Tucker Act actions to recover amounts wrongfully recouped from them. The district courts and the regional courts of appeals, on the other hand, retain jurisdiction when the United States brings an action against a discharged veteran to recoup bonus payments or other monies or when the former service member brings an action (as in *Hensala*) that prospectively challenges the government's decision to seek recoupment. Thus, the disparate readings of the statutory language that have emerged create the possibility of divergent results depending not only on where suit is brought, but also on who brings it and what relief is sought.

II. THE FEDERAL CIRCUIT'S DECISION TO GIVE UNPUBLISHED MEMORANDA AND LITIGATION AFFIDAVITS PRECEDENCE OVER DULY PROMULGATED AND PUBLISHED REGULATIONS MERITS REVIEW.

The Federal Circuit's decision also merits review for another equally important reason: Its decision to give ambiguous, unpublished memoranda priority over an agency's duly (and repeatedly) promulgated and published regulations, and then to defer to affidavits purporting to interpret or explain those memoranda, is a fundamental and disquieting departure from well established principles of administrative law.

A. To begin with, the result below cannot be squared with the published FMR (which expressly supersedes all other directives, a point curiously ignored by the courts), and neither the government nor the lower courts made any serious effort to do so. Indeed, the construction accepted by the lower courts renders superfluous the FMR's provision that recoupment is permissible only when a service member is

separated *on his own application* for obesity or lack of fitness, since the lower courts' reading provides for recoupment for a weight of fitness discharge without regard to whether it results from the service member's own application.[8] The published regulation, on its face, is thus flatly inconsistent with the agency's proffered construction of the statute.

The courts have long recognized that agencies are bound by the terms of their own regulations. *See, e.g., United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954); *Service v. Dulles*, 354 U.S. 363 (1957); *Lopez v. FAA*, 318 F.3d 242 (D.C. Cir. 2003). This principle is as applicable to the Department of Defense and the armed services as to other agencies. *Blassingame v. Secretary of the Navy*, 866 F.2d 556 (2d Cir. 1989); *Boddie v. Department of Navy,* 827 F.2d 1578 (Fed. Cir. 1987). Under this well-settled principle, the terms of the repeatedly published FMR, which provide for bonus recoupment for a weight or fitness separation only when the separation results from the application of the service member, are legally binding on the agency.

The lower courts in this case, and the government, sidestepped this principle by asserting that the agency's published regulation is not controlling; rather, in their view, the governing law is contained in two unpublished memoranda that were never available to petitioners or the public before this litigation. But the idea that unpublished, internal agency documents prevail over the terms of published regulations repeatedly promulgated by the agency turns normal rules of

---

[8] Indeed, the "volitional conduct" theory accepted below renders nearly all of the subparagraphs of FMR 090503(M) superfluous. Subsection (M) provides for recoupment for ten specified grounds of separation "for the convenience of the government" if the service member applies for discharge. Eight of those ten grounds (which include such items as enlistment in another service, running for public office, and becoming pregnant) involve volitional conduct and thus would be "voluntary" under the lower courts' reading of the statute regardless of whether the service member applied for discharge.

administrative law on their heads. Although, as the lower courts pointed out, the APA may not require that regulations governing the matters at issue here be promulgated through the notice-and-comment procedure of 5 U.S.C. § 553 (*see* App. 22a), they remain subject to the more basic requirement that any regulation purporting to bind members of the public must be published, and it may not be enforced against persons who lack notice of it if it has not been published. 5 U.S.C. § 552(a); *Morton v. Ruiz*, 415 U.S. 199 (1974).[9]

Here, the agency has done more than simply attempt to enforce an unpublished regulation in the absence of a published regulation that directly addresses a matter, as in *Morton* and similar cases. It has *repudiated* its published regulations in favor of unpublished internal directives (directives that the published regulations expressly repealed). No decisions of this Court authorize such an extraordinary result. The lower courts were unable to cite *any* precedent holding that unpublished regulations supersede published ones, to the detriment of members of the public, when an agency is dissatisfied with its own published rules or when it contends that its internal memoranda indicate that some agency officials may have preferred that different regulations be issued.[10]

Indeed, the normal remedy when an agency is unhappy with its regulations is for the agency to amend them. As the Eleventh Circuit has put it:

---

[9] The publication principle of § 552(a) is fully applicable to military regulations concerning discharge of service members. *See, e.g., National Ass'n of Concerned Veterans v. Secretary of Defense*, 487 F. Supp. 192 (D.D.C. 1979).

[10] The one case cited by the lower courts, *Hamlet v United States*, 63 F.3d 1097 (Fed. Cir. 1995), concerns the different issue of when an affected person can hold an *agency* to rules set forth in its unpublished documents. That is a different question from whether the agency can subject individuals to rules that it has not published. Congress has specifically outlawed the latter practice in 5 U.S.C. § 552(a).

> [J]udicial rewriting of regulations is improper. A court should presume regulations mean what they say. If the executive branch wishes to reconsider them, it is free to do so. Judicial assistance is not required.

Lee v. FlightSafety Services Corp., 20 F.3d 428, 433 (11th Cir. 1994). The Federal Circuit's decision to bypass this principle by giving secret regulations priority over published ones "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." S. Ct. R. 10(a).

B. The lower courts compounded their error in giving unpublished directives precedence over published regulations when, recognizing that even the unpublished "regulations" did not clearly address the issue at hand, they granted *Chevron* deference to a construction of the statutes set forth not in the supposed "regulations" themselves, but in the government's litigation affidavits. This Court has recently emphasized that *Chevron* deference is limited to formal exercises by agencies of regulatory authority delegated by Congress — typically in the form of notice-and-comment rulemaking, *see United States v. Mead Corp.*, 533 U.S. at 229-31, or some comparable exercise of agency lawmaking power, *e.g., Barnhart v. Walton*, 535 U.S. 212 (2002) (agency interpretation set forth repeatedly in published Social Security rulings and manuals and ultimately in a regulation). *Mead*'s premise is that *Chevron* deference is called for only when Congress has delegated to an agency the power to take action "with the effect of law" and when the agency has done so through "a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force." 533 U.S. at 230.

In this case, the agency's formal expression of its statutory interpretation — the FMR — provides no support for the agency's position. Indeed, the regulation supports precisely the opposite reading of the statute. And even the unpublished

memoranda that the agency and lower courts said were the true "regulations" are, as the courts acknowledged, "insufficient to understand the agency's interpretation." App. 20a. The sources the courts turned to — affidavits prepared for litigation— fall far short of demonstrating that "the agency interpretation claiming deference was promulgated in the exercise of ... authority" delegated by Congress "to make rules carrying the force of law," as *Mead* requires. 533 U.S. at 526-27. The affidavits demonstrate only the truism that the agency has a practice of recoupment (which of course is undisputed and is the reason for this case), not that that practice stemmed from an exercise of rulemaking authority satisfying *Mead*. Other courts have consistently rejected the notion that materials such as those relied on by the lower courts here qualify for deference in light of *Mead*. *See, e.g., Chao v. Russell P. LeFrois Builder, Inc.*, 291 F.3d 219, 227 (2d Cir. 2002) (agency position set forth in litigation documents not entitled to *Chevron/Mead* deference); *Landmark Legal Found. v. IRS*, 267 F.3d 1132, 1136 (D.C. Cir. 2001) (interpretation set forth in agency's litigation submissions not entitled to *Chevron/Mead* deference); *Matz v. Household Intern. Tax Reduction Inv. Plan*, 265 F.3d 572 (7th Cir. 2001) (agency position set forth in litigation documents with support from agency handbooks and rulings not entitled to *Chevron/Mead* deference); *AFGE v. Rumsfeld*, 262 F.3d 649, 658 & n.10 (7th Cir. 2001) (internal Army memoranda not entitled to *Chevron/Mead* deference).

That the Federal Circuit has diverged from other circuits' post-*Mead* precedents regarding the types of agency pronouncements entitled to deference by itself warrants this Court's attention. Review is particularly appropriate given the current lingering uncertainty over *Mead*'s full reach. *Compare Edelman v. Lynchburg College*, 535 U.S. 106, 114 (2002) (noting *Mead* does not "necessarily" limit deference to notice-and-comment rulemaking), *with id.* at 123-24 (O'Connor, J., concurring) (procedural-regulation that is le-

gally binding and is published in Code of Federal Regulations is "sufficiently formal" to merit *Mead* deference).

Review here is also called for because the combined effect of the lower courts' reliance on unpublished memoranda and its deference to litigation affidavits purporting to explain those memoranda is to subject petitioners to "regulations" the terms of which were not only unknown to them but inherently unknowable: Not only were the unpublished memoranda that the lower courts elevated to the status of regulations unavailable to petitioners, but even if petitioners had stumbled upon the memoranda, they could not have suspected that the published regulations, which expressly superseded prior directives, would be subordinated to the memoranda. And even if they had by some chance anticipated that the memoranda and not the published regulations would govern, they still could not have understood the agency's interpretation without the affidavits that were newly created for purposes of this litigation. The lower courts' holding that such secret "regulations" should prevail over the terms of an agency's duly promulgated and published regulations is a novel and dangerous distortion of administrative law principles that requires review and correction by this Court.

CONCLUSION

The lower courts' holding directly affects thousands of former servicemen and women who honorably served their country, engaged in no misconduct, and were discharged against their will because they did not succeed in meeting fitness or weight standards. Whether they and others like them should be required to return bonus payments offered as an inducement for their service — under a statute designed to apply only to service members who engage in misconduct or voluntarily leave the service before their enlistment expires — is an issue of substantial importance.

The application of the lower courts' novel decisional principles is particularly unfair in this case because of the

significant reliance interests at stake. When petitioners (some of whom already had weight problems) accepted the government's offer of a bonus and signed their enlistment or reenlistment contracts, they were entitled to rely on the published rule assuring them that they could keep their bonuses unless they engaged in misconduct or quit the service voluntarily. Having lived up to their end of the bargain by making good-faith (albeit unsuccessful) efforts to meet the services' standards, petitioners should not now be subject to government exactions based on covert "regulations" contradicting both the statute and the agency's own rules.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Michael A. Feldman
14 Lincoln Street
Brunswick, ME 04011
(207) 729-2660

Scott L. Nelson
Counsel of Record
Brian Wolfman
Public Citizen Litigation Group
1600 20th Street, N.W.
Washington, D.C. 20009
(202) 588-1000

Attorneys for Petitioners

Date: March 28, 2003

APPENDIX A

UNITED STATES COURT OF APPEALS,
FEDERAL CIRCUIT.

Bertrand R. FAVREAU, II, Jeffrey D. Thompson, Donna Marie McCurdy, Ryan D. Mumme, Bridgit Hallas, Scott Laberge, Thomas L. Fryer, Lee C. Marshall, Joseph Tingerthal, James W. Fuller, Roger F. Sablone, Jr., Robert A. Bell, Brenda G. Vanness Crista, Patrick N. Turner, and Charles D. Wiggins,
Plaintiffs-Appellants,

v.

UNITED STATES, Defendant-Appellee.

No. 01-5140.

Dec. 30, 2002.

Michael A. Feldman, of Brunswick, Maine, argued for Plaintiffs-Appellants.

Alan J. Lo Re, Trial Attorney, Washington, DC, with him on the brief were Robert D McCallum, Jr., Assistant Attorney General; David M. Cohen, Director; and Bryant G. Snee, Assistant Director. Of counsel on the brief was Cdr. Robert Schapler, Department of the Navy, Office of the Judge Advocate General, of Washington, DC, for Defendant-Appellee.

Before MAYER, Chief Judge, NEWMAN and CLEVENGER, Circuit Judges.

PER CURIAM.

This is a class action suit brought by former members of the armed forces whose enlistment or reenlistment bonuses were recouped by the United States after they were separated

from the armed forces for failing to comply with applicable weight control or physical fitness standards. Upon enlisting or reenlisting, each service-member received a monetary bonus, which served as additional compensation to be earned on a pro rata basis during the term of enlistment or reenlistment. While the facts applicable to each service-member differ slightly, military records uniformly reflect that they: (1) received dietary counseling and participated in remedial weight or fitness programs; (2) were warned that failure to meet service standards might result in discharge; and (3) failed to comply with weight or fitness standards for non-medical reasons.

Between the time of enlistment or reenlistment and discharge the Defense Department issued two memoranda addressing separation categories. In April of 1983, Assistant Secretary of Defense Lawrence Korb, under authority delegated by the Secretary of Defense, promulgated a list of separation categories that would result in recoupment. The Korb memorandum was later submitted to the Military Pay and Allowance Committee in a proposal to revise paragraph 10942 of the Department of Defense Pay Manual. On March 10, 1992, Assistant Secretary of Defense Christopher Jehn issued a memorandum creating a new separation category called "weight control failure" and directed use of this category by all of the armed forces. The Jehn memorandum stated that the "weight control failure" category was created to resolve disparity among service separation policies and provide for equitable treatment.

In 1998, Favreau was separated from the Army for failure to comply with weight control standards. The Army recouped the unearned portion of his reenlistment bonus. Favreau initiated a civil action in the District Court for the District of Maine challenging the recoupment, and the case was transferred to the United States Court of Federal Claims. Count one of the complaint alleged that the government breached enlistment or reenlistment contracts. Count two alleged that

the recoupment of the unearned portion of bonuses was an illegal exaction because it violated the Department of Defense Financial Management Regulations and provisions of the Military Pay and Allowance Act, 37 U.S.C. §§ 308 and former 308a.[1]

The court granted the government's motion to dismiss count one of the complaint, holding that the duty to pay service-members their bonuses is not contractual. It granted the government's motion for summary judgment as to count two, holding that the Department of Defense's interpretation of the statutory provisions that permit recoupment when service-members fail to maintain weight control or physical fitness standards was reasonable and consistent with congressional intent. The court also denied Favreau's cross-motion for summary judgment, holding that the Department of Defense's interpretation of the statutory provisions to permit recoupment when service-members fail weight or physical fitness standards was reasonable and that Department of Defense Financial Management Regulations are not inconsistent with sections 308 and former 308a. The court also said the armed forces' recoupment practice did not violate Department of Defense Financial Management Regulations.

For the reasons well stated in its opinion reported at 49 Fed. Cl. 635 (2001), which we adopt and set out here in an attachment, the judgment of the Court of Federal Claims is affirmed.

AFFIRMED.

---

[1] Effective October 1, 2000, 37 U.S.C. § 308a was repealed by amendments made to subsection (b) of 37 U.S.C. § 309.

APPENDIX B

ATTACHMENT

Bertrand R. FAVREAU, II., et al., Plaintiffs,

v.

The UNITED STATES, Defendant.

No. 99-339C.

United States Court of Federal Claims

June 28, 2001.

Michael A. Feldman, Brunswick, Me., for plaintiffs.

Alan J. Lo Re, Commercial Litigation Branch, Civil Division, Department of Justice, argued for defendant. With whom on the brief were Reid Prouty, Trial Attorney, Commercial Litigation Branch, Civil Division, Department of Justice, Bryant G. Snee, Assistant Director, Stuart E. Schiffer, Acting Assistant Attorney General, David M. Cohen, Director, and LCDR John Hannink, Office of the Judge Advocate General, Department of Navy.

OPINION

BRUGGINK, Judge.

This is a class action brought by former members of the United States Armed Forces who were separated from their respective services[1] because they failed to meet weight and/or physical fitness standards. Plaintiffs do not challenge their separations but instead challenge the services' recoupment of bonuses to which they became entitled at the time they agreed to enlist or re-enlist in the services.

There are two causes of action. Count One alleges that the government breached plaintiffs' enlistment or

---

[1] The term "services" refers to the Army, Navy, Air Force, and Marine Corps.

reenlistment contracts. Count Two alleges that recoupment was an illegal exaction because it violated provisions of the Military Pay and Allowances Act which authorize the payment and recoupment of bonuses[2] and the Department of Defense Financial Management Regulations ("FMR").[3] Pending are defendant's motion to dismiss and plaintiffs' motion for summary judgment with respect to Count One.[4] Also pending are cross motions for summary judgment with respect to Count Two. The motions have been fully briefed and orally argued. For the reasons discussed below, we grant defendant's motion to dismiss Count One and grant defendant's motion for summary judgment with respect to Count Two.

BACKGROUND

Each service has the authority to determine the standards that individuals must meet to remain a member of the United States Armed Forces. *See* 10 U.S.C. § 1169 (1994). It is undisputed that the representative plaintiffs failed to satisfy such requirements with respect to weight control or physical fitness. This was the underlying reason for their discharges. It is undisputed, moreover, that plaintiffs' failures to meet weight or fitness standards were not caused by medical conditions. Nor were they separated until they had received counseling, had participated in remedial weight or physical fitness programs, and had been warned that failure to meet standards might result in discharge. Plaintiffs did not ask to be separated, however.

When a service member is separated for failing these or any other standards, a reason for the separation is assigned

---

[2] 37 U.S.C. §§ 308 and 308a (1994 & Supp. IV 1998).

[3] DoD FMR Vol.7a, Ch.9, Special Pay: Enlistment and Reenlistment Bonus-Enlisted Members, ¶¶ 0901-090406 (2000).

[4] In defendant's initial dispositive motion, it moved to dismiss plaintiffs' contract claim pursuant to 12(b)(1) for a lack of subject matter jurisdiction.

pursuant to directives of the Secretary of Defense. DoD Directive 1332.14 ¶ E.2 (Dec. 21, 1993). This Directive sets out guidelines for the separation of service-members and establishes certain grounds for discharge, although the services in their individual regulations may create additional reasons.[5] Directive 1332.14, Pt. 1, ¶ P. The precise separation categories assigned with respect to plaintiffs thus varied by service and depending on when they were discharged. When the underlying reason for separation was weight control failure or failure of physical standards, one of three separation catego-

---

[5] Navy regulations, for example, provide for the following:

Expiration of Service Obligation
Selected Changes in Service Obligation
Convenience of the government Disability
Defective Enlistments and Inductions
Entry Level Performance and Conduct
Unsatisfactory Performance
Homosexual Conduct
Drug Abuse Rehabilitation Failure
Alcohol Abuse Rehabilitation Failure
Misconduct
Separation in Lieu of Trial by Court Martial
Security
Unsatisfactory Participation in the Ready Reserve
Weight Control Failure

Secretary of the Navy Instruction ("SECNAVINST") 1910.4B (29 May 1996). The services may alter the name somewhat or may choose to combine certain categories. For instance, the Air Force combines the alcohol and drug abuse rehabilitation failure under one category called "substance abuse treatment failure." *See* Air Force Instruction ("AFI") 36-3208, Ch. 5, Section F (14 October 1994). For the most part, the other services' regulations contain substantially the same reasons for separation. *See* Army Reg. 635-200 (26 July 1996); AFI 36-3208 (14 Oct. 1994); Marine Corps Order ("MCO") P1900.16E (18 Aug. 1995).

ries[6] were used: unsatisfactory performance,[7] convenience of the government, and, after 1992, weight control failure.[8]

---

[6] "Unsatisfactory performance" and "convenience of the government" can be considered separation categories in that they can embrace more than one type of underlying cause. For example, in the Air Force, a member can be separated under the category "unsatisfactory performance" for failing "to meet minimum fitness standards," for failing to "maintain standards of dress and personal appearance ...," for failing to "progress in on-the-job training ...," or for "irresponsibility in the management of personal finances." *See* AFI 36-3208, Ch.5, ¶ 5.26, 26.2, 26.3, 26.4. Similarly, a member can be separated under the category "convenience of the government" in order to, among other things, further his or her education, because he or she is a sole surviving son or daughter, or a conscientious objector. *See* AFI 36-3208, Ch. 3, Section B, ¶ 3.18, ¶ 3.12, ¶ 3.16 (14 October 1994).

[7] Until March 10, 1992, the Air Force and Marine Corps separated members who failed weight standards under the category "unsatisfactory performance." All of the services, except the Navy, currently separate members who fail fitness standards under that category as well. *See* Army Reg. 635-200 Ch. 13-2(f) (stating that separation proceeding for unsatisfactory performance is required for soldiers without medical conditions who fail Army Physical Fitness Test two consecutive times); Air Force Instruction 36-3208 (14 Oct. 1994) (stating that failure to meet minimum fitness standards for reasons not related to disability is a possible basis for separation under the category for unsatisfactory performance); Marine Corps Sep. and Ret't Man. P1900.16E (18 Aug. 95) P6206 at 6-19 (interpreting the failure of fitness tests to be "[p]erformance of assigned tasks and duties in a manner that is not contributory to unit readiness and/or mission accomplishment...," which is one of the general criteria for an "unsatisfactory performance" separation). The Navy, because it has a combined weight and physical fitness program, separates members who fail either weight or fitness standards under the same category, "weight control failure."

[8] The Army and Navy are the only services to have separated members who fail weight or fitness standards under the category for "the convenience of the government." The Navy separated members who failed weight and fitness standards under this category until March 3, 1993, and the Army separated members who failed weight standards under this category until June 11, 1993. These services stopped using the category in response to the Jehn memo, see *infra* p. 11. Since the Jehn memo was issued, a service-member who fails weight standards is separated for

(*Footnote continued*)

It is also undisputed that when one of these separation categories was assigned due to underlying issues of weight control failure or lack of physical fitness, the services each recouped unearned portions of the service member's enlistment or re-enlistment bonus. Hence this litigation.

There are two code provisions governing recoupment, one dealing with enlistment bonuses and the other with reenlistment bonuses. They provide in pertinent part:

> (d)(1) A member who *voluntarily, or because of his misconduct, does not complete the term of enlistment* for which a bonus was paid to him under this section ... shall refund the percentage of the bonus that the unexpired part of his additional obligated service is of the total reenlistment or extension period for which the bonus was paid.

37 U.S.C. § 308(d)(1)(emphasis added).

> (b) Under regulations prescribed by the Secretary of Defense ... a person who *voluntarily, or because of his misconduct, does not complete the term of enlistment* for which a bonus was paid to him under this section ... shall refund that percentage of the bonus that the unexpired part of his enlistment is of the total enlistment period for which the bonus was paid.

37 U.S.C. § 308a(b)(emphasis added).

The Secretary of Defense is granted explicit authority to implement these provisions through regulations, and has done so. Those regulations are considered below. A complete understanding of the services' interpretation of these code sections requires examination of additional sources, however: specifically, the separation directive referenced above, memoranda, and several affidavits unique to the litigation.

"weight control failure." The Army uses "failure to meet body fat standards." *See* Army Reg. 635-200, Ch. 18, p.69 (26 June 1996).

The court will assume for the moment that it can rely on these affidavits for the purpose of setting out the Secretary's interpretation of the statutory and regulatory language.

Bonuses are not offered to all personnel. Rather they are used as incentives to recruit or keep individuals with certain specialties. The representative's enlistment "contracts" contain, for example, such language as the following: "I fully understand that continued entitlement to the Enlistment Bonus may be terminated and a pro-rata portion of my Enlistment Bonus may be recouped if I am considered not technically qualified in the bonus specialty ... because (a) I am no longer classified in that NEC ... for any of the following reasons within my control: ... loss of any other mandatory qualification for effective performance ... when such ... loss is voluntary...." Def.'s Summ. J. and Mot. to Dismiss App. II at 345.

Insofar as relevant here, recoupment is only possible with respect to those who "voluntarily" do not complete their term of service.[9] The Department of Defense's (DoD) interpretation of the term "voluntarily" was furnished by Colonel Bobby A. Little in his affidavit. Colonel Little is Director, Officer/Enlisted Personnel Management in the Office of the Secretary of Defense (OSD). He explains that the Director of Officer/Enlisted Personnel Management (OEPM) with the OSD is delegated authority for, among other things, recoupment practices and policies service-wide. OEPM is also responsible for implementing directives of the Secretary of Defense or the Secretary's designees. OEPM, according to Colonel Little, has

---

[9] Although the statutes provide that recoupment is also appropriate when a service member fails to complete a term because of misconduct, defendant justifies the government's recoupment based on its interpretation that the plaintiffs have failed to complete their terms voluntarily.

> determined that the question whether an individual has failed to complete a term of enlistment "voluntarily" depends on whether the service-member was separated for engaging in conduct that is within the control of the service-member but incompatible with military service. In that regard, we have not limited recoupment to separations granted at the request of the service-member; rather, even where the military service initiates the separation, we have concluded that recoupment is appropriate if the conduct that resulted in the separation was voluntary, i.e., within the service-member's control.
>
> ....
>
> ... The [separation] codes that trigger recoupment are agreed upon by the services and my office ....

DoD thus interprets the term "voluntarily" to refer to whatever the service member did or did not do to prompt separation. So long as there is counseling and an opportunity to overcome deficiencies, and so long as persons with medically-diagnosed problems that interfere with weight reduction or maintaining physical fitness may not be separated for weight control failure or lack of physical fitness, the failure to meet standards is deemed volitional. The focus is thus not on the characterization of the separation itself but on the service member's actions or inactions leading to separation.

Colonel Little goes on to explain that, in order to implement its interpretation of the recoupment statutes, DoD has designated certain separation categories for use when the underlying reason for separation is weight control failure or lack of physical fitness. These have varied over time and by service, but they consist of the three categories used to separate plaintiffs in this case: weight control failure, unsatisfactory performance, and convenience of the government. The DoD has also directed that when these categories are used

due to weight control failure or lack of physical fitness, certain codes which relate to the category trigger recoupment.[10]

This explanation is consistent with what happened to plaintiffs here. They failed weight control or physical fitness standards; they had been afforded the opportunity to meet those standards; they did not have medical problems preventing compliance; they were separated under one of the three triggering separation codes; and their bonuses were recouped.

Portions of this practice can be traced directly to the separation directives and to memoranda that will be examined below. The critical connection between DoD practice and the phrase "voluntarily ... fails to complete the term of service," however, is only drawn in writing by Col. Little's affidavit. The underlying rationale is not captured in the regulations governing financial matters, including those dealing with recoupment.

The connection between recoupment and separation categories is established in two memoranda. The first is an April 13, 1983 memo from Assistant Secretary of Defense, Lawrence Korb,[11] with respect to when the services were to recoup bonuses. In pertinent part, the Korb memo provides:

---

[10] The affidavit of Erwin J. Wybenga, Deputy Director of the Defense Joint Military Pay System of the Defense Finance and Accounting Service (DFAS) amplifies Little's explanation.

[11] The Korb memo is a regulation entitled to the force and effect of law. *See Hamlet v. United States*, 63 F.3d 1097, 1105 (1995) (setting out four part test to determine if agency publication is entitled to force and effect of law). Assistant Secretary of Defense Korb had the authority to issue the memorandum. Under the recoupment provisions, the Secretary of Defense is granted the authority to prescribe regulations to carry out recoupment. 37 U.S.C. §§ 308(f) and 308a(b). The Secretary of Defense has delegated this grant of authority to the Assistant Secretary of Defense. In 1984, this delegation was to the Assistant Secretary of Defense for Manpower, Reserve Affairs, and Logistics, (MRA & L) Lawrence Korb. DoD Directive 5124.1 ¶ F.1 (July 26, 1982). Pursuant to this delegation,

(*Footnote continued*)

> The purpose of this memorandum is to ... standardize the reasons for which recoupment of bonuses is required.
>
> ....
>
> Attached is a list of reasons from the Enlisted Separations Directive (DoDD 1332.14) ... for which we will recoup enlisted bonuses. In order to complete the standardization process, request you [sic] furnish this office a complete list of separations reasons ... used each Service. Please annotate on the Service's list the reasons/does that correspond to the attached list of separation reasons ....
>
> After review, these lists will be provided to the OSD Comptroller for incorporation in the DoD Pay Manual.

Def's. Suppl. Br.App. at 1.

Attached to the Korb memo was a list of separation categories entitled "Enlisted Bonus Recoupment Reasons."[12] In-

---

Korb was granted the authority to "issue instructions and one-time directive-type memoranda ... which carry out the policies approved by the Secretary of Defense in assigned fields of responsibility." DoD Directive 5124.1 ¶ F.1 (July 26, 1982). Included in his responsibilities was the compensation of service-members. *See* DoD Directive 5124.1 ¶ D.9 (July 26, 1982).

[12] Gloria D. Harris, the individual responsible for implementing the laws, regulations, and policies related to the payment of personnel in all of the services, stated in her affidavit that:

> The "reasons" for separation set forth in the [FMR] list ... were taken from the categories of separation contained within the DoD Directive and/or Service regulations that deal with the separation of enlisted personnel.
>
> When a member's conduct results in separation under a particular category of separation contained within the separation regulations of that member's service, that category of separation is used to make the recoupment determination.

(*Footnote continued*)

cluded on the list were "Convenience of the Government" and "Unsatisfactory Performance." Not included on the list, because it was not yet a separation category, was "Weight Control Failure." The memo says nothing about limiting recoupment to those service members who request separation.

The reference in the Korb memo to the DoD Pay Manual was to what was later to become the FMR. Responsibility for incorporation of directives such as the Korb memo into the FMR fell to the Military Pay and Allowances Committee ("MPAC"), later renamed the Defense Finance and Accounting Service ("DFAS"). This organization has responsibility for drafting and maintaining financial regulations. In addition, at the direction of the Under Secretary of Defense Comptroller/Chief Financial Officer, it also has responsibility for executing recoupments. Although DFAS maintains the relevant recoupment regulations, according to Nelson Toye, the Deputy Chief Financial Officer for DoD, the substance of the regulations must come from directives of the Assistant Secretary of Defense for Force Management Policy, in this case, Korb.

After the Korb memo DFAS amended existing recoupment regulations, in pertinent part, as follows:

> *Reasons for Recoupment.* For purposes of recoupment of any unearned portions of enlistment or reenlistment bonuses, the term "who voluntarily or because of misconduct" includes (but is not limited to) members separated for the reasons listed below:
>
> A. Transfer to Fleet Reserve, Fleet Marine Corps Reserve, or the Army or Air Force Reserve ... with release

---

In other words, the category of separation under which a member was separated provides the proper point of entry into paragraph 090403 when making the recoupment determination.

Def's Opp. and Reply App. at 95-96.

to inactive duty before expiration of the number of years' service for which a bonus was paid.

B. Marriage--female member.

C. Resignation-separation by reason of acceptance of member's resignation ....

D. As a result of a writ of habeas corpus

E. Reduction to permanent grade member voluntarily separated, or transferred to a Reserve Component if required by law, following reduction to a lower permanent grade from a higher temporary grade in which the member was erroneously reenlisted.

F. Disability not in the line of duty.

G. Approved sentence of court-martial or conviction by a civil court.

H. Misconduct.

I. Homosexuality

J. Defective enlistment (includes erroneous and fraudulent enlistments).

K. Entry level performance and conduct.

L. Unsatisfactory Performance.

M. Drug and alcohol rehabilitation failure.

N. As Directed by the Secretary of the Military Service concerned in individual cases. Includes ... for the convenience of the government upon the application and interest of the member because of special or unusual circumstances including, but not limited to, the following:

...

4. Sole surviving family member.

...

6. Overweight/obesity or lack of physical fitness.

DoDPM ¶ 10942.[13] This new version of the recoupment regulation was intended to "incorporate[ ] the contents of the [Korb] memorandum of 13 April 1983." Def.'s Suppl. App. at 39.

The Korb memo was followed in March 1992 by a memo from Assistant Secretary of Defense Christopher Jehn. Jehn directed the creation of a new separation category for "weight control failure." He also directed that this category be treated the same for benefit eligibility purposes as separation for "drug and alcohol abuse rehabilitation failure."[14] Pursuant to the Korb memo, the services had been directed to recoup from members separated for drug or alcohol abuse failure. The FMR provisions with respect to recoupment have not been amended in light of the Jehn memo.

The preamble to the FMR provision refers to reasons for separation, and the ones listed are very similar to comparable categories of separation. In one notable respect, however, there is a difference. Subdivision N of ¶ 090403 references separations for the "convenience of the government," but refers to the "application and interest of the member" and lists, among other convenience separations, "overweight/obesity or physical fitness." ¶ 090403(N)(6). This gives rise to plaintiffs' argument that the services could only

---

[13] Paragraph 10942 of the DoDPM was renumbered as ¶ 090403 when the FMR was created.

[14] The Jehn memo provides, in pertinent part, as follows:

> To resolve the disparity among Service separation policies and to provide for more equitable treatment of our members, I am establishing a new separation category in DoDD 1332.14, called "Weight Control Failure." When the sole reason for separation is failure to meet weight standards and the member's performance and conduct otherwise comport with established standards, the member will be separated under this category. This category is similar to existing categories of separation for Drug and Alcohol Abuse Rehabilitation Failure and will be treated similarly for benefit eligibility.

recoup pursuant to subdivision N and only from individuals who requested separation.

During the relevant time only the Army and the Navy used the separation category "for the convenience of the government" for members who failed to meet weight or physical fitness standards. Unlike other convenience separations, those regulations made no provision for members "applying for" or showing an "interest in" separation when the underlying reason was weight control or physical fitness failure. *See* Navy Personnel Manual, Article 3620200 (15 Aug. 1991); Army Reg. 635-200, Ch. 5, ¶ 5-15 (15 Oct. 1985); Army Reg. 635-200, Ch.2, Section II, Notification Procedure, ¶ 2-2 (17 Oct. 1990).

Defendant calls attention to the fact that the preamble to the recoupment regulation states that the list is not intended to be exhaustive. It recites that "[T]he term 'who voluntarily or because of misconduct' includes (but is not limited to) members separated for the reasons listed below ...." ¶ 090403.

In response to the court's request for supplemental briefing, defendant filed the Nelson Toye affidavit addressed to the apparent inconsistency between the separation categories developed in response to DoD Directive 1332.14 and the list of separation categories in ¶ 090403 of the FMR. In his affidavit, Nelson Toye acknowledges that the FMR may be a less-than-faithful rendition of the Korb and Jehn memos, but he emphasizes that the FMR does not have the authority to deviate from the substance of the Korb and Jehn memos. It would be beyond the purview of DFAS to write them in that way. Its function is purely that of codifier. Defendant furnishes the relevant delegations to illustrate the respective differences of authority between DFAS and the Assistant Secretaries of Defense (for Manpower, Reserve Affairs, and Lo-

gistics as of 1983; for Force Management and Personnel as of 1992).[15]

It is undisputed that the services have, without exception, applied the FMR in a manner consistent with the government's explanation, i.e., they have not limited recoupment to personnel discharged for the convenience of the government, nor have they conditioned recoupment on "the application and interest of the member," even for discharges for the convenience of the government. Moreover, they have imposed limitations on recoupment that are consistent with DoD's position that *most* weight control or physical fitness failures are volitional, i.e., recoupment did not occur until an opportunity for improvement was afforded and there was no recoupment if there were medical reasons for failure.

DISCUSSION

I. PLAINTIFFS' BREACH OF CONTRACT CLAIM

Count One of the complaint alleges that recoupment breached plaintiffs' enlistment and/or re-enlistment contracts. Plaintiffs base their contract claim on the following language in their enlistment and re-enlistment documents: "As a member of the Armed Forces of the United States, I will be: ... (5) Entitled to receive pay, allowances, and other benefits as provided by law and regulation." D/D Form 4/1, C, 9(a)(5). Plaintiffs claim that recoupment constitutes a failure to provide the pay, allowances, and other benefits as provided by

---

[15] MPAC did not have the authority to "reject" Secretary Korb's directions and thereby establish agency recoupment policy. *See* DoD Directive 5154.13 (Feb. 11, 1980). It was required to refer all "matters requiring personnel policy resolution" to the Assistant Secretary of Defense (MRA & L), who, at the time, was Lawrence Korb. *Id.* He was the only individual with the authority necessary to change the agency's recoupment policy. The Korb memo is in fact listed as one of the sources in the bibliography to the FMR's pay provisions. *See* DoD FMR Vol. 7A, Bibliography, B-10 (July 1996).

law and thus constitutes a breach of their enlistment or reenlistment contracts.

The duty to pay the servicemen their bonuses is not contractual, however, and the mere reference to the "entitlement to pay, allowances, and other benefits" in their enlistment and/or re-enlistment contracts does not transform it into a duty which, if violated, gives rise to contractual damages. *See United States v. Larionoff*, 431 U.S. 864, 869, 97 S.Ct. 2150, 53 L.Ed.2d 48 (1977). It is well-established that "a soldier's entitlement to pay is dependent upon statutory right." *See Bell v. United States*, 366 U.S. 393, 401, 81 S.Ct. 1230, 6 L.Ed.2d 365. Count One, in short, fails to state a claim upon which relief can be granted. *See Wyatt v. United States,* 2 F.3d 398, 402 (Fed.Cir.1993). The appropriate way to evaluate the merits of plaintiffs' claim is by examining the statutory and regulatory provisions.

II. CROSS-MOTIONS FOR SUMMARY JUDGMENT ON COUNT TWO

Does DoD's Interpretation Violate Statutory Provisions?

In Count Two plaintiffs contend that the recoupment statutes and regulations do not allow for recovery of their bonuses. Therefore, recoupment constitutes an illegal exaction, which is grounds for recovery under the Tucker Act. *See* 28 U.S.C. § 1491(a)(1) (1994 & Supp. V 1999); *Eastport S.S. Corp. v. United States,* 178 Ct.Cl. 599, 605-606, 372 F.2d 1002 (1967).

Plaintiffs' first argument is that the agency's practice of recoupment is at odds with the clear meaning of the language of the recoupment statutes themselves. They contend that the failure of a service member to "complete the term of enlistment" has obvious reference to the administrative act of separation. In that context, the term "voluntarily" allegedly has a well-established meaning, namely, that the service

member has applied for separation.[16] Under certain circumstances not applicable here, the member can indeed request separation and it is common to refer to requested separations as voluntary and non-requested separations as involuntary.

Plaintiffs also rely on the dictionary definition of voluntary: "in a voluntary manner, of one's own free will." Webster's Unabridged Dictionary at 2049 (1979). Pointing to the separations themselves, plaintiffs contend that they were clearly not separated "in a voluntary manner." They were never asked if they agreed to their discharges.

Plaintiffs' definition, however, and indeed their entire approach, begs the question, "Is *what* voluntary?" It is true that the administrative act of separation itself was not voluntary in any meaningful way. Indeed defendant has stipulated that it "involuntarily separated plaintiffs." The term "separation," however, is not used in the recoupment provisions.[17] The relevant phrase is, "complete the term of enlistment."[18]

---

[16] Plaintiffs also argue that the use of "misconduct" as an alternative ground for recoupment means that the term "voluntarily" cannot involve any "conduct." We disagree. Assuming that the actions and inactions of plaintiffs can be characterized as "conduct," it does not follow that the alternative grounds for recoupment are inconsistent. "Conduct," of necessity, is a broader concept than "misconduct," which, in any event has been given special meaning as grounds for separation. *See, e.g.,* DoD Directive 1332.14, Pt. 1, ¶ K.1 (a)(1)-(4) (listing the following as reasons for separation for misconduct: minor disciplinary infractions, a pattern of misconduct consisting of (a) discreditable involvement with civil or military authorities or (b) conduct prejudicial to good order and discipline, commission of a serious offense, or civilian conviction.).

[17] This is what distinguishes the present case from those relied on by plaintiffs which deal with involuntariness in the narrow context of determining whether the court has jurisdiction, which depends in turn, on whether the cessation of pay, i.e. separation, was involuntary. *See, e.g., Canonica v. United States,* 41 Fed.Cl. 516 (1998); *West v. United States,* 35 Fed.Cl. 226 (1996); *McIntyre v. United States,* 30 Fed.Cl. 207 (1993).

[18] Because we find the statutory language refers to the voluntariness of the underlying behavior and not the act of separation, we respectfully

(*Footnote continued*)

The actor in the case of separation is the agency; in the case of non-completion of the term of service, it is the service member. What the government contends is that, because the underlying reasons prompting separation relate to acts of volition and because these actions were known by the service members to lead to separation, the early termination of the enlistment is also voluntary.[19]

Plaintiffs argue that the statutory language is plain on its face. We disagree. The statutory provisions do not make it clear whether only those who request separation voluntarily come to the end of their enlistment. No part of the phrase "voluntarily ... does not complete the term of enlistment" is defined in this context in the code itself. The language, in short, is susceptible of both parties' readings, and is thus ambiguous.

The DoD is given explicit authority to adopt interpretive regulations, and it has done so. An examination of those regulations would normally be the next step in applying the statutes. As explained above, however, by themselves the regulations are insufficient to understand the agency's interpretation. What has been offered by way of explanation in

---

disagree with the court in *Iliff v. Schlessinger,* 539 F.2d 1275 (10th Cir.1976).

[19] We recognize, as will be discussed in connection with whether the agency violated its own regulations, that the agency used separation coding as the device to trigger recoupment. This confused the briefing, as did the government's quixotic insistence that the court should only be concerned with separation categories. Fortunately for the government, neither argument is inconsistent with the agency's interpretation of the term "voluntarily." The critical initial link in the agency's practice and explanation is that the failure of weight or physical fitness standards, rather than the separation, is seen as volitional. Only as a matter of administrative shorthand do the recoupment memoranda and regulations then classify certain separation codes as subject to recoupment, *but only because the agency has already determined that the action or inaction was volitional and known to lead to discharge.*

this case consists of directives relating to separation, memoranda relating to recoupment, DoD's financial regulations, and actual agency practice; all knit together by the affidavit of Col. Little. It is only by considering this package that one could discern the relevant unifying interpretation: DoD views a failure to meet weight and fitness standards, under most circumstances, as volitional, and separations resulting therefrom mean that the service members "voluntarily" failed to complete their term of service. It is immaterial to this view that the service members did not request separation.

Determining whether this interpretation carries out the intent of the statute depends in part on whether the agency view is entitled to any deference. The court's guidelines in this respect are drawn from *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). In general terms, if Congress has not spoken to the question at issue, and there is an "express delegation of authority to the agency to elucidate a specific provision of the statute by regulation," the court will defer to the agency's interpretation so long as it is not "arbitrary, capricious, or manifestly contrary to the statute." *Chevron U.S.A.*, 467 U.S. at 843-44, 104 S.Ct. 2778. We cannot disturb the Secretary's construction of the statute "if it reflects a plausible construction of the plain language of the statute and does not otherwise conflict with Congress' expressed intent." *Rust v. Sullivan*, 500 U.S. 173, 184, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991) (citing *Chevron U.S.A.*, 467 U.S. at 842-43, 104 S.Ct. 2778).

Although there has been an express delegation of authority here, the issue is clouded by the fact that the agency's interpretation is not artfully expressed. Indeed, one of the plaintiffs' arguments is that the interpretation offered in the affidavits, which admittedly is consistent with practice, is inconsistent with the FMR.

The degree of deference to which less formal expressions of agency interpretation, such as administrative practice, are

entitled was addressed recently by the Supreme Court in *United States v. Mead Corp.*, 121 S.Ct. 2164, 2168 (2001). The Court held that "administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *Id.* at 2170-71.One of the indicia of entitlement to deference is the conclusiveness with which Congress has invested the agency with interpretive powers. *Id.* at 2172.In *Mead,* the Court found that the delegation to the United States Customs Service was less than conclusive, and thus its interpretive rulings were not entitled to the full weight of *Chevron* deference.[20] *Id.* at 2173-75.

The indicia that the agency's construction here is entitled to *Chevron* deference are considerably greater than in *Mead.* First, the delegation of interpretive regulatory authority here is explicit. Second, the Korb and Jehn memoranda are of considerably more gravitas than the approximately 10,000 annual individual letter rulings of Customs' 46 regional offices. Here, the Assistant Secretary was the delegee for announcing service-wide what DoD's interpretation of the recoupment statute would be. Korb's memorandum instantly bound all the services to a single practice. Although neither memoranda was subject to public notice and comment, that fact does not bar the application of *Chevron. Mead,* at 2173; *see generally* 5 U.S.C. § 553(a)(2) (1994) (exceptions to the Administrative Procedure Act for matters "relating to agency management or personnel."); *cf. Hamlet,* 63 F.3d at 1105

---

[20] Customs' rulings were, however, potentially entitled to some deference under *Skidmore v. Swift & Co.*, 323 U.S. 134, 65 S.Ct. 161, 89 L.Ed. 124 (1944), based on the agency's presumed special expertise. Slip op. at 15.

(Fed.Cir.1995) (explaining that unpublished agency regulations can be entitled to the force and effect of law).

Moreover, the affidavits offered by defendant as evidence of agency practice are more than mere post-hoc rationalization. *See Parker v. OPM,* 974 F.2d 164, 166 (Fed.Cir.1992) (refusing to rely on affidavit produced for litigation as evidence of long-standing agency practice where there had been no official agency interpretation of the statute); *Felzien v. OPM,* 930 F.2d 898, 902-03 (1991) (refusing to grant deference to long-standing agency practice of ignoring regulation's language). The practice explained in the affidavits is consistent with the regulations and statutes governing recoupment and the agency's interpretation of them. Moreover, the agency's practice of recoupment for certain types of discharges irrespective of "application and interest" has not varied. This is a critical factor to consider in determining whether to assign weight to the agency's interpretation. *See Smiley v. Citibank,* 517 U.S. 735, 740, 116 S.Ct. 1730, 135 L.Ed.2d 25 (1996) ("To be sure, agency interpretations that are of long standing come before us with a certain credential of reasonableness, since it is rare that error would long persist."); *Rosete v. OPM,* 48 F.3d 514, 518-19 (1995) (deferring to agency's "consistent, long-standing regulatory interpretation of the statute so long as it is reasonable.").

DoD's construction is also not inconsistent with the small amount of legislative history on point. The first section of the 1951 Senate Report that accompanied the bill that amended the bonus statutes to provide for recoupment states as follows:[21]

---

[21] Plaintiffs argue that the version of the reenlistment bonus statute that was amended in 1951 is "substantially different" from the current reenlistment bonus provision, 37 U.S.C. §§ 308 and 308a. We do not discern any material difference. *Compare* Career Compensation Act of 1949, Pub.L.81-351, § 207, 63 Stat. 811 (Oct. 12, 1949), *with* 38 U.S.C. §§ 308 and 308a.

> The Bureau of the Budget believes that a provision should be added to the bill which would provide for the recoupment of unearned bonus money when separation prior to completion of enlistment takes place if such separation is not due to *physical disability incurred in the line of duty* or otherwise occasioned by circumstances *beyond the control of the individual.*

See S.Rep. No. 82-935 (1951), *reprinted in* 1951 U.S.C.C.A.N. 2464, 2466. (emphasis added). The second section, entitled "Discussion of the Bill," uses different language to describe the circumstances for which recoupment would be appropriate. The section states:

> Another provision of the bill, not heretofore contained in law, permits the recovery of any part of unearned reenlistment bonuses paid where the persons serving in such reenlistment *voluntarily,* or *as a result of their own misconduct,* do not complete their term of enlistment. *This provision was added to the bill at the suggestion of the Bureau of the Budget.*

Id. at 2465 (emphasis added). The committee's acknowledgment that the provision was added at the suggestion of the Bureau of the Budget suggests that the committee meant to adopt the characterization of voluntariness in the Bureau of Budget's version, namely, that it refers to volitional behavior.

In sum, the agency's practice and its explanation of the rationale for that practice are fully consistent. *See Bowen v. Georgetown Univ. Hosp.,* 488 U.S. 204, 212-13, 109 S.Ct. 468, 102 L.Ed.2d 493 (1988). DoD's interpretation of the statutory provisions is thus entitled to substantial deference in determining the meaning of the recoupment statutes. An agency's interpretation of its own regulations must be upheld unless it is "plainly erroneous or inconsistent with the regulation." *Martin v. Occupational Safety & Health Review Comm'n,* 499 U.S. 144, 150-51, 111 S.Ct. 1171, 113 L.Ed.2d 117 (1991). To strike down DoD's interpretation in this circumstance would require us to hold as a matter of law, either

that the agency had to treat failure to satisfy weight and fitness standards as non-volitional, or that it had to impose a requirement that the subsequent separation be at the service member's request. Neither holding is dictated by the statutory language or by reason.[22] The agency's contrary determinations are within the range of reasonable interpretations of ambiguous code provisions.[23]

Did the Services Violate the Recoupment Regulation?

A related but alternative argument plaintiffs make is that the services can only recoup from service members discharged for failure to meet weight or fitness standards under subdivision N of ¶ 090403 of the recoupment regulations, i.e., for the convenience of the government. Moreover, because this subdivision permits recoupment for service members "upon application and interest," and because none of the plaintiffs requested their separation, plaintiffs maintain that the FMR was violated. The practice, in short, was inconsistent with the literal wording of the regulations, according to

---

[22] In construing an analogous code provision dealing with recoupment of education costs, the district court in *Hensala v. Department of the Air Force,* No. C00-01793 WHA, 2001 U.S. Dist. LEXIS 7398 (N.D.Cal. May 25, 2001), found that the circumstances surrounding a service member's failure to conceal his homosexuality was conduct calculated to lead to separation. *Id.* at *28. The court held that there was substantial evidence to support the service's decision that the member had thus "voluntarily ... fail[ed] to complete the period of active duty ..." as required in the recoupment statute at issue, 10 U.S.C. § 2005(a)(3). *Id. United States v. Gears,* 835 F.Supp. 1093, 1095 (N.D.Ind.1993), dealing with the same statute, came to a different result. That case involved a midshipman who was discharged for, among other things, non-compliance with weight standards. Although the court appears to reject the government's broad reading of the term "voluntary," it specifically pointed to confusion about the physical standards applicable to Gears and the absence of evidence that Gears knew that his particular weight would result in discharge where he met requirements for maximum percentage of fat. *Id.* at 1098-99.

[23] *Accord Scott v. Lehman,* Slip Op. at 13-15 (D.S.C. June 23, 1987).

plaintiffs. This is a legitimate alternative argument. *See Felzien,* 930 F.2d at 902-03.

According to defendant, the error in the argument lies in the incorrect assumption that DoD can only recoup from members who fail weight or physical fitness standards under subdivision N. It is undisputed that service members failing weight or fitness standards could be separated for reasons other than "convenience of the government." It was possible to discharge them for unsatisfactory performance, or, later, "weight control failure" or its equivalent. Defendant contends, therefore, that recoupment could occur so long as the service member was discharged for any one of the reasons listed in ¶ 090403. We agree.

With respect to discharges based on unsatisfactory performance, defendant's construction is telling. Each of the listed categories in ¶ 090403 is in the alternative. It is apparent that the references to "Overweight/obesity" or "lack of physical fitness" in subdivision N merely modify or are examples of circumstances in which the service may have discharged someone for its own convenience. They cannot reasonably be construed to bar recoupment when the separation is characterized in some other way.

As to weight control failure, which is not listed as its own separation category, defendant points out that the regulation is not limited to listed categories and that the FMR was, in any event, out of date. It had not been amended in light of the Jehn memo, which had created a separation category called weight control failure and had instructed the services to treat it as equivalent to drug rehabilitation failure for recoupment purposes. We agree with defendant. The Jehn memo is controlling,[24] and the FMR must be read in its light. This means

---

[24] Similar to the Korb memo, the Jehn memo is entitled to the force and effect of law. *See Hamlet,* 63 F.3d at 1105. Assistant Secretary Jehn was acting pursuant to authority delegated to him by the Secretary of Defense when he issued the memorandum. *See* DoD Directive 5124.2 ¶ F.1

(*Footnote continued*)

that all the categories under which plaintiffs were separated-convenience of the government, weight control failure, and unsatisfactory performance-were covered by the recoupment regulation and thus available as grounds for recoupment.

Plaintiffs' remaining argument is that, with respect only to "convenience" terminations,[25] ¶ 090403 adds a requirement unique to recoupment, namely that the termination had to be the subject of the service member's application and interest. We disagree with plaintiffs' reading of subdivision N. Weight control failure and lack of physical fitness are among the reasons that one could be discharged for the convenience of the government. Invoking that ground for separation is not contingent upon the "application and interest" of the member. That is, however, a concept that applies to other types of "convenience of the government" separations, for example, surviving sons or daughters, early release to further education, or pregnancy or childbirth.[26]

As defendant points out, reading the "application and interest" language as applicable to plaintiffs here would be anomalous in that, during the time weight control failure was

---

(Jan. 26, 1990). The Jehn memo appears to be substantive in that it provides the services with the right to recoup for "weight control failure" without any prerequisite that the service member request separation. Moreover, the language of the Jehn memo is mandatory and does not merely advise the services to take certain action.

[25] These separations, insofar as they were predicated on weight control or physical fitness failure, stopped after the Jehn memo.

[26] *See* Army Reg. 635-200, Ch. 5, Separation for Convenience of the Government, Section III, Surviving Sons or Daughters, ¶ 5-4 (26 June 1996); SECNAVIST 1910.4B, Enlisted Administrative Separations, Personnel Separations, Pt.1, Reasons for Separation, ¶ C, Convenience of the Government, Section 4(a), Early release to further education (29 May 1996); AFI 36-3208, Administrative Separation of Airmen, Ch.3, Voluntary Separation Prior to Expiration of Term of Service, Section B, Reasons for Voluntary Convenience of the Government (COG) Separation, ¶ 3.17, Pregnancy or Childbirth (14 Oct. 1994).

processed for separation under the "convenience of the government" rubric, it was not possible for service members to apply or express their interest to initiate such a separation. The "application and interest" language, in short, merely describes those circumstances where a service member can apply for separation under the category "for the convenience of the government." It was not intended to nor could it have imposed an additional element of a separation for convenience.

CONCLUSION

The applicable statutory provisions and the FMR leave something to be desired in terms of clarity. Recoupment of plaintiffs' bonuses did not violate either, however. DoD's interpretation of the statutory provisions to permit recoupment when service members failed weight or physical fitness standards was reasonable. While the FMR recoupment provisions are dated, and, on their face, confusing, when read in light of current practice and the binding memoranda of the Assistant Secretaries of Defense, they become coherent. The FMR is not a violation of the statutory provisions nor did agency practice violate the FMR. Accordingly, defendant's motion to dismiss count I is granted; defendant's motion for summary judgment as to count II is granted; and plaintiffs' cross motion for summary judgment is denied. The Clerk is directed to enter judgment accordingly. Costs to each party.

APPENDIX C

Defense Department Financial Management Regulation 090503, provides:

Reasons for Recoupment. For purpose of recouping any unearned portions of enlistment, reenlistment, or retention bonuses, the term "who voluntarily or because of misconduct" includes (but is not limited to) members separated for the reasons listed below:

A. Transfer to Fleet Reserve, Fleet Marine Corps Reserve, or the Army or Air Force Reserve ... with release to inactive duty before expiration of the number of years' service for which a bonus was paid. Retirement for disability is excluded.

B. Marriage - female member.

C. Resignation-separation by reason of acceptance of member's resignation ....

D. As a result of a writ of habeas corpus.

E. Voluntary separation, or transfer to a Reserve Component, if required by law, following reduction to a lower permanent grade from a higher temporary grade in which the member was erroneously reenlisted.

F. Disability not in the line of duty.

G. Approved sentence of court-martial or conviction by a civil court.

H. Misconduct.

I.. Defective enlistment (includes erroneous and fraudulent enlistments).

J. Entry level performance and conduct.

K. Unsatisfactory performance.

L. Drug and alcohol rehabilitation failure.

M. As directed by the Secretary of the Military Department concerned (or designee) in individual cases.

Includes voluntary separation, or transfer to a Reserve Component if required by law; and for the convenience of the government upon the application and interest of the member because of special or unusual circumstances including, but not limited to, the following:

1. To permit attendance at a civilian school.

2. To permit enlistment in another Military Service.

...

3. To permit enlistment of aliens in the armed forces of their country.

4. Sole surviving family member.

5. Conscientious objection.

6. Overweight/obesity or lack of physical fitness.

7. Pregnancy. Recoupment is required only where member is voluntarily separated, not when pregnancy causes loss of qualification in bonus skill.

8. Public office.

9. Parenthood.

10. Personality Disorder. Recoupment is required for administrative discharges. Recoupment is not required when member is medically discharged with a physical disability.

EXCEPTIONS: Hardship and dependency separations are considered involuntary for the purposes of this paragraph and do not require recoupment of unearned portions of a bonus.

O. Reasons established by Military Departments (reasons will be approved by ASD (FMP)). The decision to recoup will be made by DASD (MPP).

P. See the cognizant Military Services' procedural instructions for lists of separation reasons and the corresponding separation program designator (SPD) codes.

Supreme Court, U.S.
FILED
JUL 7 2003
OFFICE OF THE CLERK

(2)

No. 02-1466

In the Supreme Court of the United States

BERTRAND R. FAVREAU, II, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record

PETER D. KEISLER
Assistant Attorney General

DAVID M. COHEN
THOMAS M. BONDY
ALAN J. LO RE
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

27 pp

QUESTION PRESENTED

Petitioners were discharged from the military for failure to meet weight or fitness requirements for non-medical reasons after undergoing counseling and remedial weight reduction programs and being informed that such failure could result in discharge. The question presented is:

Whether the court of appeals erred in adopting the trial court's conclusion that the recoupment of the unearned portions of petitioners' enlistment or re-enlistment bonuses did not violate 37 U.S.C. 308 and 308a (Supp. V 1999), and implementing regulations, which require recoupment of unearned portions of bonuses paid to service members who "voluntarily" fail to complete their term of enlistment.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	9
Conclusion	22

TABLE OF AUTHORITIES

Cases:

Auer v. *Robbins*, 519 U.S. 452 (1997)	16
Bowen v. *United States*, 49 Fed. Cl. 673 (2001)	20
Chevron U.S.A. Inc. v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)	6
Christiensen v. *Harris County*, 529 U.S. 576 (2002)	16, 17
EEOC v. *Associated Dry Goods Corp.*, 449 U.S. 590 (1981)	21
Hensala v. *Department of the Air Force*, 148 F. Supp. 2d 988 (N.D. Cal. 2001)	14
Iliff v. *Schlessinger*, 539 F.2d 1275 (10th Cir. 1976)	12, 13
Scott v. *Lehman*, Civ. No. 2:86-0734-1 (D.S.C. June 23, 1987)	14
Udall v. *Tallman*, 380 U.S. 1 (1965)	21
United States v. *Gears*, 835 F. Supp. 1093 (N.D. (Ind. 1993)	14
United States v. *Mead Corp.*, 533 U.S. 218 (2001)	16

Statutes and rule:

Administrative Procedure Act, 5 U.S.C. 551 *et seq.*	21
5 U.S.C. 553(a)(2) (1994)	2
10 U.S.C. 2005(a)	14
37 U.S.C. 308	1-2, 12
37 U.S.C. 308(d)(1)	2, 6, 7, 9, 10
37 U.S.C. 308a (Supp. V 1999)	1
37 U.S.C. 308a(b) (Supp. V 1999)	1-2, 6, 7, 9

Rule—Continued: Page

Sup. Ct. R. 10 14

Miscellaneous:

S. Rep. No. 935, 82d Cong., 1st Sess. (1951) 7, 12

In the Supreme Court of the United States

No. 02-1466

BERTRAND R. FAVREAU, II, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-3a) is reported at 317 F.3d 1346. The decision of the United States Court of Federal Claims (Pet. App. 4a-28a) is reported at 49 Fed. Cl. 635.

JURISDICTION

The judgment of the court of appeals was entered on December 30, 2002. The petition for a writ of certiorari was filed on March 28, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Enlisted members of the military services (the Army, Air Force, Navy and Marine Corps) may be paid bonuses upon enlistment or re-enlistment. The "bonus statutes" set forth at 37 U.S.C. 308 and 308a (Supp. V

1999) authorize the Services to recoup bonuses from members who fail to complete their entire enlistment or re-enlistment term.[1] The statutes provide that the government shall recoup the unearned portion of a service member's bonus—the portion associated with the part of the enlistment term the service member did not serve—when that member "voluntarily, or because of his misconduct, does not complete the term of enlistment for which a bonus was paid to him." 37 U.S.C. 308(d)(1), 308a(b). This case concerns the recoupment of bonuses where service members do not complete their term of enlistment because of failure to meet weight control or physical fitness standards.

The bonus statutes authorize the Secretary of Defense (Secretary) to issue implementing regulations. 37 U.S.C. 308, 308a(b). Acting under authority delegated by the Secretary, in 1983 Assistant Secretary of Defense Lawrence Korb promulgated a list of separation categories that would result in recoupment. The categories included in his directive, known as the "Korb memorandum," were: (1) Convenience of the Government (physical standards—overweight/obesity); (2) Unsatisfactory Performance; (3) Drug Abuse Rehabilitation Failure; and (4) Alcohol Abuse Rehabilitation Failure. For none of those separation categories was recoupment conditioned on a separation request by the service member. Pet. App. 11a-13a; C.A. App. 740-742.[2]

---

[1] All references to Section 308a refer to 37 U.S.C. 308a (Supp. V 1999), which was repealed in 2000.

[2] Although the Korb memorandum was not promulgated through notice-and-comment rulemaking, it falls within the APA exception for "matters 'relating to agency management or personnel.'" Pet. App. 22a (quoting 5 U.S.C. 553(a)(2) (1994)). Petitioners do not contend otherwise.

The Korb memorandum was sent to the Military Pay and Allowance Committee (MPAC) for incorporation into paragraph 10942 of the Department of Defense (DoD) Pay Manual (DoDPM), which later became paragraph 090403 in the DoD Financial Management Regulations (FMR).[3] Thus FMR 090403 was intended to "incorporate[] the contents of" the Korb "memorandum of 13 April 1983." Pet. App. 15a. FMR 090403 provides in relevant part:

> *Reasons for Recoupment.* For purpose of recoupment of any unearned portions of enlistment or reenlistment bonuses, the term "who voluntarily or because of misconduct" includes (but is not limited to) members separated for the reasons listed below:
>
> * * *
>
> L. Unsatisfactory Performance.
>
> M. Drug and alcohol rehabilitation failure.
>
> * * *
>
> N. As directed by the Secretary of the Military Service concerned in individual cases. Includes * * * for the convenience of the Government upon the application and interest of the member because of special or unusual circumstances including, but not limited to, the following:
>
> 1. To permit attendance at a civilian school.
>
> * * *
>
> 4. Sole surviving family member.
>
> 5. Conscientious objection.

---

[3] See C.A. App. 1427-1429 (DoDPM 10942 change dated Feb. 15, 1984, pre-incorporation); *id.* at 1430-1432 (DoDPM 10942 change dated Apr. 4, 1984, post-incorporation); *id.* at 618-620 (FMR 090403, 1999 version).

> 6. Overweight/obesity or lack of physical fitness.
>
> * * *

Pet. App. 29a-30a; C.A. App. 618-620.[4]

For most "convenience of the Government" separations—such as those relating to a service member's decision to attend a civilian school, or the service member becoming the sole surviving family member—military regulations permitted service members to "apply[] for" or show an "interest in" separation on that basis. Pet. App. 16a. "[D]uring the time weight control failure was processed for separation under the" category of "convenience for the government," however, "it was not possible for service members to apply or express their interest to initiate such a separation." *Id.* at 28a; see *id.* at 16a.

In March 1992, Assistant Secretary of Defense Christopher Jehn, also acting under authority delegated by the Secretary, created a new separation category called "Weight Control Failure," and he directed use of that category by all of the Services. Pet. App. 15a & n.14; C.A. App. 761. The pertinent directive, the "Jehn memorandum," provided explicit guidance regarding the way in which separations under the Weight Control Failure category would be treated for purposes of benefits: "This category is similar to existing categories of separation for Drug and Alcohol Abuse Rehabilitation Failure and will be treated similarly for benefit eligibility." Pet. App. 15a n.14; C.A. App. 761. Thus, as

---

[4] No relevant differences exist between FMR 090403 and the current version of the regulation, FMR 090503. Pet. App. 29a-30a. As explained below, however, the Department of Defense has determined to revise the current regulation to eliminate any potential ambiguities. See p. 21, *infra*.

with separations under the Drug or Alcohol Rehabilitation Failure categories, the Services have consistently recouped under the Weight Control Failure category without regard to whether the service member initiated the process leading to discharge.

2. Petitioners are a class of former service members. Upon enlisting or re-enlisting, each received a monetary bonus that would serve as additional compensation to be earned on a pro-rata basis throughout the enlistment term. During the term of service, each failed to meet the weight or physical fitness standards of his or her Service. Each petitioner received dietary counseling and participated in remedial weight or fitness programs; each was warned that failure to meet Service standards might result in discharge; and each failed to comply with weight or fitness standards for non-medical reasons. Pet. App. 4a-5a. As a result, each petitioner was separated from military duty under one of the separation categories contained within the service separation regulation in effect at the time, including Unsatisfactory Performance, Convenience of the Government, and Weight Control Failure. *Id.* at 6a-7a, 26a. The one that applied to a given petitioner depended on the separation date and the Service involved.[5] After separation, the Services recouped the unearned portion of the bonus paid to each petitioner.

3. Petitioners brought suit in the United States District Court for the District of Maine, which transferred the case to the Court of Federal Claims (CFC or trial court). Petitioners alleged that the recoupment consti-

---

[5] For the periods associated with each category, see C.A. App. 1309-1322, 1339-1340 (Unsatisfactory Performance); *id.* at 1323-1327 (Convenience of the Government); *id.* at 1318, 1321, 1328-1344 (Weight Control Failure); see also Pet. App. 7a nn.6-8.

tuted a breach of contract and violated the bonus statutes and implementing regulations. The CFC certified petitioners' suit as a class action, and granted the government's motion to dismiss petitioners' contract claims. Because the duty to pay bonuses arises from statute rather than contract, the court concluded that petitioners could not assert valid breach-of-contract claims. Pet. App. 17a-18a. Petitioners do not raise in this Court any issues arising from the breach-of-contract claims.

The government then filed a motion for summary judgment on petitioners' statutory and regulatory claims, which the CFC granted. The CFC first rejected petitioners' claim that the recoupments were not authorized by statute because the failure to complete a term of enlistment based on noncompliance with weight control or physical fitness standards is not "voluntary" within the meaning of 37 U.S.C. 308(d)(1), 308a(b). See Pet. App. 18a-20a. Applying the two step framework of *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the court held that the statutes are ambiguous and do not preclude the Services' construction because they do not define the phrase "voluntarily . . . does not complete the term of enlistment." Given that ambiguity, the court continued, the challenged recoupment did not violate the plain statutory text. Pet. App. 20a.[6]

---

[6] The court explained that *Chevron* deference was particularly appropriate in this case because Congress provided an "explicit" delegation of "interpretive regulatory authority," Pet. App. 22a, and because the agency had consistently followed the policy at issue, *id.* at 23a. Although the Korb and Jehn memoranda were not subject to notice-and-comment, the court explained, they fell within the exception for "matters 'relating to agency management

After examining the FMRs, the directives issued by Assistant Secretaries Korb and Jehn, DoD's consistent recoupment practices, and the legislative history of Sections 308(d)(1), 308a(b), the court concluded that DoD's recoupment policies represent a permissible implementation of the statute. Pet. App. 21a-27a. For years, DoD had construed the phrase "voluntarily does not complete the term of enlistment" to encompass cases where the service member engages in voluntary conduct that the service member knows will lead to separation. "DoD's interpretation of the statutory provisions to permit recoupment when service members failed weight or physical fitness standards," the court held, "was reasonable." *Id.* at 28a; see *id.* at 24a-25a.

That construction, the court pointed out, was also consistent with the "small amount of legislative history on point," which stated that recoupment of unearned bonus money is permissible "when separation prior to completion of enlistment takes place if such separation is not due to *physical disability incurred in the line of duty* or otherwise occasioned by circumstances *beyond the control of the individual.*" Pet. App. 23a-24a (quoting S. Rep. No. 935, 82d Cong., 1st Sess. 3 (1951)). The court explained that, contrary to petitioners' arguments, neither the statute nor common sense suggested that the Services "had to treat failure to satisfy weight and fitness standards as non-volitional, or that [they] had to impose a requirement that the subsequent separation be at the service member's request." *Id.* at 25a.

The trial court also rejected petitioners' claim that, under the recoupment regulations, service members could be discharged for failure to meet weight or fitness

---

or personnel,'" and "bound all the services to a single practice." *Id.* at 22a.

standards only "for the convenience of the government" pursuant to subdivision N of para. 090403 (see p. 3, *supra*), and then only when the separation occurred "upon the application and interest" of the service member. Pet. App 29a-30a. The court held that service members "failing weight or fitness standards" can be separated based on categories "other than 'convenience of the government,'" such as "unsatisfactory performance" or (when it was later added) "weight control failure." *Id.* at 26a. The "references to '[o]verweight/obesity' or 'lack of physical fitness' in subdivision N," the court explained, "are examples of circumstances in which the service may have discharged someone for its own convenience. They cannot reasonably be construed to bar recoupment when the separation is characterized in some other way." *Ibid.* The court also explained that FMR 090403 does not make the categories it described exclusive, and that the "Jehn memorandum" of 1992 had created "a separation category called weight control failure" that was to be treated "as equivalent to drug rehabilitation failure for recoupment purposes." *Ibid.* The Jehn memorandum, the court explained, is mandatory, "controlling," and "entitled to the force and effect of law." *Id.* at 26a-27a & n.24.

Finally, the court rejected the argument that, with respect to "convenience of the Government" terminations for obesity and noncompliance with physical fitness standards, recoupment is improper unless the service member applied for or expressed interest in separating on that ground. Pet. App. 27a (The government stopped making "convenience" terminations in weight or physical fitness cases in 1992, after the Jehn memorandum was issued.). The court explained that the phrase "application and interest" in FMR 090403 applies to other convenience of the government cate-

gories (*e.g.*, sole surviving son or daughter, early release for further education) but not weight control failure or lack of physical fitness. The contrary construction, the court explained, would be "anomalous in that, during the time weight control failure was processed for separation under the 'convenience of the government' rubric, it was not possible for service members to apply or express their interest to initiate such a separation." *Id.* at 27a-28a. "The 'application and interest' language," the court therefore concluded, "merely describes those circumstances where a service member can apply for separation under the category 'for convenience of the government.' It was not intended to nor could it have imposed an additional element of a separation for convenience." *Id.* at 28a.

4. The Federal Circuit affirmed in a *per curiam* opinion "[f]or the reasons well stated in" the trial court's opinion. Pet. App. 3a. Adopting the trial court's decision, the court of appeals attached that opinion to its own. See *id.* at 1a-3a.

ARGUMENT

The decision of the Court of Federal Claims, adopted by the Federal Circuit, does not conflict with any decision of this Court or any other court of appeals. Accordingly, further review is unwarranted.

1. Petitioners first argue that they did not fail to complete their terms of enlistment "voluntarily," and that 37 U.S.C. 308(d)(1) and 308a(b) therefore preclude the military from recouping the unearned portion of their bonuses. In other words, they claim that, even though the conduct that led to their separations was volitional—and they knew it would cause them not to complete their term of enlistment—those provisions entitle them to retain the portion of their bonuses

corresponding to the part of the enlistment term they did not serve. See Pet. 11-12. That argument is incorrect.

a. The Department of Defense has long construed the word "voluntarily" in Section 308(d)(1) to encompass not only those cases where the service member tells the Service that he does not wish to complete his enlistment term, but also cases in which the service member engages in volitional conduct that he knows will lead to his separation and thus cause him not to complete his enlistment term. As the Court of Federal Claims explained:

> DoD thus interprets the term "voluntarily" to refer to whatever the service member did or did not do to prompt separation. So long as there is counseling and an opportunity to overcome deficiencies, and so long as persons with medically-diagnosed problems that interfere with weight reduction or maintaining physical fitness may not be separated for weight control failure or lack of physical fitness, the failure to meet standards is deemed volitional. The focus is thus not on the characterization of the separation itself but on the service member's actions or inactions leading to separation.

Pet. App. 10a. The court summarized: "What the government contends is that, because the underlying reasons prompting separation relate to acts of volition and because these actions were known by the service members to lead to separation, the early termination of the enlistment is also voluntary." *Id.* at 20a.

Both the Court of Federal Claims and the Federal Circuit properly concluded that DoD's longstanding construction is a permissible interpretation of an ambiguous statute. Pet. App. 3a, 20a, 28a. There is no rea-

son why a service member who willfully engages in conduct (or refrains from conduct) *knowing* that it will result in his separation from the Service—*i.e.*, that it inevitably will prevent him from completing his enlistment term—does not "voluntarily" fail "to complete the term of enlistment." And there is no reason why a service member who engages in volitional conduct knowing that it will result in his discharge should necessarily be treated differently (much less better) than one who merely requests a discharge. The voluntary failure to fulfill a known condition precedent to completing a term of enlistment is a voluntary failure to complete that term. As the trial court concluded:

> To strike down DoD's interpretation in this circumstance would require us to hold as a matter of law, either that the agency had to treat failure to satisfy weight and fitness standards as non-volitional, or that it had to impose a requirement that the subsequent separation be at the service member's request. Neither holding is dictated by the statutory language or by reason.

Id. at 24a-25a.

The DoD's longstanding construction is supported by the statute's legislative history as well. As the district court observed, the Senate Report accompanying the bill that added recoupment to the bonus statutes described the bill as providing "for the recoupment of unearned bonus money when separation prior to completion of enlistment takes place if such separation is not due to *physical disability incurred in the line of duty* or otherwise occasioned by circumstances *beyond*

the control of the individual." Pet. App. 23a-24a (quoting S. Rep. No. 935, 82d Cong., 1st Sess. 3 (1951)).[7]

b. Petitioners likewise err in asserting (Pet. 12-13) that the decision below conflicts with *Iliff* v. *Schlesinger*, 539 F.2d 1275 (10th Cir. 1976), a two-page court of appeals decision issued almost three decades ago. *Iliff* merely held that a request to be discharged is *sufficient* to render the discharge voluntary, even if the court cannot determine whether the factors that led the service member to make the request were voluntary. *Iliff* does not address whether a request for separation is *necessary*. Nor, for that matter, does it address what constitutes voluntary action in the absence of a request for discharge.

In *Iliff*, the service member requested separation on the ground that he was a conscientious objector. The Tenth Circuit upheld the challenged recoupment of his bonus under 37 U.S.C. 308, concluding that assertion of

---

[7] Petitioners similarly err in contending that the Department of Defense's construction renders the category of "misconduct" superfluous. Pet. 11. Voluntary action that leads to discharge does not necessarily constitute "misconduct," and Congress presumably did not wish to require the military services to impose the stigma of the "misconduct" label on every officer who engages in volitional conduct knowing it will result in discharge. In that respect, petitioners' challenge (while consistent with their financial interests) is contrary to the long-term interests of most service members. If failure to meet weight control standards for non-medical reasons were not categorized as voluntary conduct, it would likely be categorized as misconduct, imposing the unnecessary stigma of a "misconduct" termination on service members who fail to control their weight. Thus, having benefitted from the military's decision not to stigmatize them with the "misconduct" label, petitioners now seek a financial reward—the right to keep a bonus for the portion of the enlistment term they never served—as well.

conscientious objector status did not preclude recoupment. See 539 F.2d at 1276. The court acknowledged that application of the statutory term "voluntary" to conscientious objectors "contains some abstrusity." *Ibid.* Nonetheless, it explained:

> [We are] certain * * * that Congress had no intent to project upon the military or the courts the age-old controversy of whether human actions dictated by sincere faith or the mandates of a subjective conscience constitute voluntary or involuntary actions. In terms of the ordinary meaning of "voluntary," the compulsion of conscience motivating an objector cannot be distinguished, for example, from the subjective decision of one who seeks discharge to ease familial or economic hardship occasioned by a father's death.

Ibid. The court thus held that, where a service member asks to be discharged, "the compulsion of conscience motivating an objector" to make the request does not require that he be treated differently under the recoupment statute than other service members making discharge requests for other reasons. *Ibid.*[8]

Petitioners thus overread *Illif* when they argue that it "rejected a reading of the recoupment statutes under which the determination of 'voluntariness' turned on the volitional nature of the service member's action," and instead "adopted [the] clear and simple reading" that "[a] member 'voluntarily' does not complete his or

---

[8] Indeed, the Tenth Circuit's conclusion that a request for discharge is sufficient to render voluntary the failure to complete an enlistment term makes particular sense as applied to the sole surviving family member criterion, as that status is not produced by voluntary action, but the decision whether to make a request for discharge clearly is a voluntary choice.

her term of enlistment *when he or she asks to be discharged.*" Pet. 12-13. *Iliff* instead held that a voluntary request for separation is *sufficient* to render the failure to complete the enlistment term voluntary. It had no occasion to determine—and did not determine—whether such a request is *necessary*. Nor, for that matter, did it explore the possibility of voluntary failure to complete an enlistment term in the absence of such a request. Thus, notwithstanding the trial court's passing assertion of "disagree[ment] with" *Illiff*, Pet. App. 19a-20a n.18, the decision in this case is not inconsistent with *Illiff*'s holding (that a request for separation is sufficient to render the failure to complete a term of enlistment voluntary), and there is no conflict warranting this Court's review.[9]

---

[9] Petitioners also assert (Pet. 13-14) that the decision in this case conflicts with *Hensala* v. *Department of the Air Force*, 148 F. Supp. 2d 988 (N.D. Cal. 2001), and *United States* v. *Gears*, 835 F. Supp. 1093 (N.D. Ind. 1993), which involved recoupment of education payments under 10 U.S.C. 2005(a). Those district court decisions have no precedential effect, and thus establish no conflict warranting review by this Court. See Sup. Ct. R. 10. Nor does the sparse district court authority invoked by petitioners "show a need for direction from this Court." Pet. 14. Besides, *Gears* does not conflict with the instant decision. Central to the district court's decision to reject recoupment for failure to meet weight standards in that case was its finding that "nothing in the record indicates that Mr. Gears knew that his weight threatened his active service as well as his commission." 835 F. Supp. at 1099. Here, by contrast, the trial court found that petitioners were not "separated until they had * * * been warned that failure to meet standards might result in discharge." Pet. App. 5a. Yet petitioners continued in their failure to meet those standards nonetheless. See *id.* at 25a n.22 (discussing *Hensala* and *Gears*); contrast *Scott* v. *Lehman*, Civ. No. 2:86-0734-1 (D.S.C. June 23, 1987) (reproduced in C.A. App. 623-640) (holding that service member's failure to complete his enlistment term was voluntary under bonus statutes

2. Alternatively, petitioners rely on the Department of Defense's regulations, arguing that the trial court impermissibly gave priority to "ambiguous, unpublished memoranda" over those published regulations. See Pet. 15-18. According to petitioners, FMR 090403 permitted "bonus recoupment for a weight or fitness separation only when the separation results from the *application* of the service member." Pet. 16. That argument too lacks merit, and raises no issue warranting further review.

As an initial matter, both the trial court and court of appeals agreed that the regulation on which petitioners rely is ambiguous. Pet. App. 20a (FMR "insufficient to understand the agency's interpretation"); *id.* at 28a (FMRs "confusing" and "leave something to be desired in terms of clarity"). Consequently, in construing the regulation, the courts consulted the directive that the regulations were meant to incorporate (the Korb memorandum), a later directive with the force and effect of law (the Jehn memorandum), and the agency's longstanding, consistent, and undisputed practice. See *id.* at 21a. When read together, those sources support the Services' contention that the regulations are best read as permitting recoupment where service members, like petitioners, are discharged under the Unsatisfactory Performance, Convenience of the Government (physical fitness or obesity), or Weight Control Failure categories.

Contrary to petitioners' submission, there is nothing exceptional about relying on such sources in construing

---

because he was repeatedly counseled about his weight, was aware that his weight could result in separation, and suffered from no medical condition preventing him from meeting weight and fitness standards).

an ambiguous agency regulation. This Court has repeatedly recognized that an agency's interpretation of its *own regulation* is "controlling unless 'plainly erroneous or inconsistent with the regulation,'" *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997), and has deferred to such interpretations even if expressed "in the form of a legal brief," so long as the interpretation reflects the agency's "fair and considered judgment on the matter," *id.* at 462 (citations omitted). See *Christensen* v. *Harris County*, 529 U.S. 576, 588-589 (2000) (noting that *Chevron* deference is owed to an agency regulation interpreting an ambiguous statute, and that *Auer* deference is owed to an agency's construction of an ambiguous agency regulation, but rejecting *Auer* deference because the regulation at issue there was not ambiguous).[10]

---

[10] Petitioners likewise err in accusing (Pet. 18) the court of having accorded *Chevron* deference to the affidavits of DoD personnel charged with overseeing the recoupment process. See Pet. App. 11a, 21a. The court did not afford those sworn statements more importance than other sources. Instead, the court considered the affidavits after making the "critical" and undisputed findings that "the affidavits offered by defendant as evidence of agency practice are more than mere post-hoc rationalization"; that the DoD's actual recoupment practice "has not varied"; and that "[t]he practice explained in the affidavits is consistent with the regulations and statutes governing recoupment and the agency's interpretation of them." *Id.* at 23a; see also *id.* at 17a ("It is undisputed that the services have, without exception, applied the FMR in a manner consistent with the government's explanation."). Relying on such sources to determine an agency's longstanding practice when construing an ambiguous regulation is not impermissible under *Auer*.

Consequently, there is no merit to petitioners' claim (Pet. 18) that the lower courts viewed the affidavits as having the "effect of law" under *United States* v. *Mead Corp.*, 533 U.S. 218 (2001). Both courts properly considered the relevant directives and agency

Petitioners' contrary argument in any event proceeds from the regulation-specific premise that FMR 090403 unambiguously provides "that recoupment is permissible only when a service member is separated *on his own application* for obesity or lack of fitness." Pet. 15-16.[11] But the FMR is not unambiguous. FMR 090403M does mention separation "for the convenience of the government upon the application and interest of the member because of special or unusual circumstances including, but not limited to" the listed categories, such as the service member becoming the "[s]ole

---

practice as evidence of the agency's construction of its regulations. The decision below, moreover, does not purport to issue a specific holding regarding the scope of (or place a particular gloss on) *Mead*, and thus does not bind future panels to any particular construction of that decision. In any event, petitioners' *Mead* argument is premised on the notion that the FMR is unambiguous and that the affidavits and the Jehn and Korb memoranda were introduced to "contradict" it. Pet. i; see Pet. 16 (interpretation "flatly inconsistent" with regulation). That claim does not present an open issue of law; *Christensen* v. *Harris County* makes it clear that courts ought not defer to an agency construction that contradicts a regulation's "obvious meaning." 529 U.S. at 588. Nor is the issue properly presented in this case, because the FMR on which petitioners rely was hardly unambiguous. See pp. 17-19, *infra*.

[11] We note that this argument does not apply to many members of the plaintiff class, such as those separated under the category of "Unsatisfactory Performance," FMR 090403K. For those plaintiffs, the Korb memorandum and FMR 090403 expressly require recoupment without making reference to an application for separation. Pet. App. 29a; C.A. App. 619. The reference to application or interest appears only in a phrase connected with—and thus creates ambiguity only with respect to service members separated under—the "for the convenience of the government" category found in FMR 090403M. Accordingly, any class members discharged for unsatisfactory performance have no basis to complain about recoupment actions in the absence of an application.

surviving family member," FMR 090403M.4, "[c]onscientious objection," FMR 090403M.5, and "[o]verweight/obesity or lack of physical fitness," FMR 090403M.6. However, as the trial court explained, "during the time weight control failure was processed for separation under the" category of "convenience of the government, * * * it was not possible for service members to apply or express their interest to initiate such a separation." Pet. App. 27a-28a. Unlike the regulations for "other convenience separations," the "regulations made no provision for members 'applying for' or showing an 'interest in' separation when the underlying reason was weight control or physical fitness failure." *Id.* at 16a. Petitioners' construction thus would render the overweight/obesity/fitness category mere surplusage, applicable only in a set of cases that could not exist. Given the "anomalous" nature of that result, the courts reasonably read the reference to an "application" or expression of "interest" as relevant only to those categories for which an application or expression of interest could be made. See *id.* at 27a-28a; pp. 8-9, *supra*.

That result is consistent with the agency's longstanding practice and other indications of the agency's intent. The FMR was designed to incorporate the contents of the Korb memorandum—itself a binding directive—which did not condition recoupment on the service member's submission of an application where the separation resulted from failure to control weight or meet fitness requirements. (To the contrary, as noted above, service members could not submit an application for separation based on weight control or physical fitness failure, since the regulations did not provide for such applications.) The Military Pay and Allowance Committee (MPAC) thus explained that the "proposed

change incorporates the contents of the Assistant Secretary of Defense memorandum of 13 April 1983." C.A. App. 1395; see Pet. App. 15a. And the FMR bibliography cites the Korb memorandum as the authority for FMR 090403 (the former DoDPM 10942). Pet. App. 17a n.15; C.A. App. 1416. The clear intent of the FMR's drafters, therefore, was to reflect Assistant Secretary Korb's direction to recoup against those separated under the Convenience of the Government (obesity/physical fitness) category without requiring an application for discharge from the service member.[12] It was not error to construe the regulation in light of that drafting history.[13]

---

[12] Admittedly, the FMR incorporated the Korb memorandum inartfully. C.A. App. 619-620. Apparently, when the FMR's drafters included weight or fitness failure under the convenience of the government category, they failed to strike the pre-existing language regarding the "application and interest" of the service member relevant to other convenience of the government discharges—*e.g.*, sole surviving family member. See Pet. App. 27a, 30a; C.A. App. 619-620, 1384-1387. At the same time, making the "application and interest" language applicable to the weight or fitness category would render that category pure surplusage. See pp. 8-9, 17-18, *supra*. Confronted with the resulting ambiguity, the courts below did not err in accepting the agency's construction, which was consistent with its longstanding practice.

[13] Petitioners repeatedly argue that the courts below erred in failing to recognize that the FMR expressly "superseded" all previous guidance. See Pet. 20; see also Pet. 5, 8. Because the FMR was also designed to incorporate those prior directives, however, it was permissible for the courts to consult them in construing the FMR, particularly given that the FMR *cited* the earlier Korb directive as the authority for its issuance. The courts below, moreover, did not expressly address petitioners' supersession argument, and petitioners did not timely raise that argument before the trial court. See Gov't C.A. Br. 31.

That result is likewise supported by the Jehn memorandum of March 1992, which created a new category of separation entitled "Weight Control Failure," Pet. App. 15a; C.A. App. 761, and likened separations under that category to those under the Drug or Alcohol Abuse Rehabilitation Failure categories—both of which result in recoupment under the Korb memorandum and FMR 090403 without any reference to a service member's application for separation. Pet. App. 29a; C.A. App. 619, 742.[14] Petitioners, moreover, ignore the introductory sentence to the FMR, which clarifies that its list of circumstances requiring recoupment is not exhaustive. The list of reasons for separation that trigger recoupment, it states, "includes (*but is not limited to*) members separated for the reasons listed below." FMR 090403 (emphasis added). Finally, while petitioners suggest (Pet. 8) that the Jehn memorandum's reference to treating weight control failure like drug and alcohol failure for "benefit" purposes precludes its application to bonus pay, military pay is considered one of the "benefits" associated with military service. See *Bowen* v. *United States*, 49 Fed. Cl. 673 (2001).[15]

---

[14] The failure to incorporate the Jehn memorandum into FMR 090403 does not preclude recoupment against members separated under the Weight Control Failure category. The FMR expressly states that the list of categories it provides is not exclusive and, as the trial court found, "MPAC did not have the authority to 'reject'" such "directions and thereby establish agency recoupment policy." Pet. App. 17a n.15; see *id.* at 16a.

[15] Petitioners denigrate the Korb and Jehn directives as "secret." Pet. 1, 8, 18, 20. In reality, there is nothing secret about them, as evidenced by the references to the Korb memorandum in the FMRs. See Pet. App. 17a n.15. Those directives, moreover, are entitled to great weight (and had the force and effect of law within the military) even though not promulgated through notice-and-comment rulemaking. As the decision below explained, notice-

In any event, whether the FMR is ambiguous (as both courts concluded) or unambiguous (as petitioners contend) is not an issue of continuing importance. The Department of Defense has advised us that it plans to revise the FMR to clarify it and ensure that it clearly reflects the policies and constructions it was meant to embody. The proper interpretation of a soon-to-be superseded pay regulation is not the sort of issue that warrants this Court's review.

---

and-comment was not required under the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, because the regulations and directives fall within the exception for "matters 'relating to agency management or personnel.'" Pet. App. 22a. Moreover, the regulations and directives exhibit the sort of formality and consideration that make them worthy of respect, since they "bound all the services to a single practice," *ibid.*; they were issued pursuant to an "explicit" delegation of "interpretive regulatory authority," *ibid.*; *id.* at 11a n.11; C.A. App. 1352, 1355, 1361-1363, 1371, 1376-1377; and they reflected the agency's consistent practice, Pet. App. 23a. See *EEOC* v. *Associated Dry Goods Corp.*, 449 U.S. 590, 600 n.17 (1981) ("contemporaneous construction" "deserves special deference when it has remained consistent over a long period of time"); see also, *e.g.*, *Udall* v. *Tallman*, 380 U.S. 1, 15 (1965) (applying same principle to interpretation of regulation).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

PETER D. KEISLER
Assistant Attorney General

DAVID M. COHEN
THOMAS M. BONDY
ALAN J. LO RE
Attorneys

JULY 2003

(3)

Supreme Court, U.S.
FILED
JUL 7 2003
OFFICE OF THE CLERK

No. 02-1466

IN THE

Supreme Court of the United States

BERTRAND R. FAVREAU, II, *et al.*,

Petitioners,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF NATIONAL VETERANS LEGAL SERVICES PROGRAM AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

BARTON F. STICHMAN
NATIONAL VETERANS LEGAL SERVICES PROGRAM
2001 S Street, N.W.
Washington, DC 20009
(202) 265-8305

STEPHEN B. KINNAIRD*
TANYA Y. BARTUCZ
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, DC 20005
(202) 736-8000

Counsel for Amicus Curiae

* Counsel of Record

July 7, 2003

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

16 pp

QUESTIONS PRESENTED

1) Is a service member who is involuntarily discharged for not meeting weight and fitness standards obligated to refund an enlistment or reenlistment bonus on the ground that he or she has "voluntarily" failed to "complete the term of enlistment for which a bonus was paid" within the meaning of the governing statutes?

2) May a court disregard an agency's published regulations by (a) treating unpublished, internal agency memoranda as legally binding "regulations" whose terms prevail over the published regulations, and (b) granting *Chevron/Mead* deference to an agency's statutory construction set forth in litigation affidavits that contradict the published regulations?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF *AMICUS CURIAE*	1
INTRODUCTION	1
REASONS FOR GRANTING THE WRIT	3
I. THE COURT OF APPEALS MISREAD THE STATUTE, CREATING A CONFLICT BETWEEN THE CIRCUITS, AND FAILED TO DEFER TO THE GOVERNING REGULATION	3
II. THE DECISION BELOW THAT AN UNPUBLISHED INTERNAL MEMORANDUM HAS THE FORCE AND EFFECT OF LAW CONFLICTS WITH THIS COURT'S PRECEDENT	6
III. ENTITLEMENT TO ENLISTMENT AND REENLISTMENT BONUSES IS AN IMPORTANT ISSUE AFFECTING THOUSANDS OF SERVICE MEMBERS	7
CONCLUSION	10

TABLE OF AUTHORITIES

CASES — Page

Bowen v. *Georgetown Univ. Hosp.*, 488 U.S. 204 (1988) 5
Bowles v. *Seminole Rock & Sand Co.*, 325 U.S. 410 (1945) 5
Chevron U.S.A., Inc. v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) 4
Iliff v. *Schlessinger*, 539 F.2d 1275 (10th Cir. 1976) 3
King v. *St. Vincent's Hosp.*, 502 U.S. 215 (1991) .. 4
Massachusetts Fair Share v. *Law Enforcement Assistance Admin.*, 758 F.2d 708 (D.C. Cir. 1985) 5
Morton v. *Ruiz*, 415 U.S. 199 (1974) 7
Motor Vehicles Mfrs. Ass'n of the U.S., Inc. v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983) 5
Shalala v. *Guernsey Mem'l Hosp.*, 514 U.S. 87 (1995) 5
Texaco, Inc. v. *Short*, 454 U.S. 516 (1982) 6
Torres v. *INS*, 144 F.3d 472 (7th Cir. 1998) 7
United States v. *Alaska*, 503 U.S. 569 (1992) 7
Vigil v. *Andrus*, 667 F.2d 931 (10th Cir. 1982) 7
Wright v. *Georgia*, 373 U.S. 824 (1963) 6

STATUTES AND REGULATION

37 U.S.C. § 308(d)(1) 3
37 U.S.C. § 308a(b) (1998) (repealed 2000) 2, 3
7A Dep't of Def., DOD 7000.14-R, *Financial Management Regulation: Military Pay Policy and Procedures – Active Duty and Reserve Duty* (May 2003) 2, 4

TABLE OF AUTHORITIES – continued

OTHER AUTHORITIES

Page

Defense Fin. & Accounting Serv., *2003 Military Pay Rates: Active Duty and Reserve Monthly Drill Pay Tables* (Jan. 1, 2003), *at* http://www.dfas.mil/money/milpay/pay/01-2003.pdf (updated May 29, 2003) 8

U.S. GAO, GAO/NSIAD-97-39, *Military Attrition: DOD Could Save Millions by Better Screening Enlisted Personnel* (Jan. 1997)..... 9

U.S. GAO, GAO/NSIAD-00-146, *Military Personnel: Services Need to Assess Efforts to Meet Recruiting Goals and Cut Attrition* (Jun. 2000).. 8

U.S. GAO, GAO-03-149, *Military Personnel: Management and Oversight of Selective Reenlistment Bonus Program Needs Improvement* (Nov. 2002)..... 8

SCHOLARLY AUTHORITIES

1 William Blackstone, *Commentaries on the Laws of England* (photo reprint 1979) (1765) 6

INTEREST OF *AMICUS CURIAE*

Amicus curiae National Veterans Legal Services Program (NVLSP) is an independent non-profit organization dedicated to helping veterans whom our country's institutions have failed.[1] NVLSP first focused its efforts on soldiers who emerged from the military with less-than-fully-honorable discharges, many of whom were young, undereducated, and from minority backgrounds. More recently, NVLSP has also advocated and litigated on behalf of disabled veterans. The ruling below deprives discharged veterans of a central element of their compensation in conflict with the plain meaning of the statute and official regulation, and NVLSP thus has an interest in the proper resolution of a question of federal law that affects thousands of this country's veterans.

INTRODUCTION

Named petitioners in this case are fifteen individuals who were separated from the military for failure to meet weight or fitness standards. They represent a certified class of thousands of others similarly situated. The government has stipulated that each named petitioner was involuntarily separated. It is also undisputed that each tried in good faith to meet the standards, but was unsuccessful. The named petitioners had received enlistment bonuses ranging from $1,000 to $30,000.

Pursuant to 37 U.S.C. § 308a(b) (now § 309), a service member "who *voluntarily*, or because of his misconduct, does not complete the term of enlistment for which a bonus was paid to him . . . shall refund" a portion of the bonus

---

[1] No party authored this brief in whole or in part. No person other than *amicus curiae*, its members, and its counsel has made a monetary contribution to the preparation or submission of this brief.

Both parties have consented to the submission of this brief.

proportional to the unexpired term of the enlistment. 37 U.S.C. § 308a(b) (1998) (repealed 2000) (emphasis added). The regulation implementing this statute is more detailed, providing that "the term 'who voluntarily or because of misconduct' includes (but is not limited to) members separated . . . upon the application and interest of the member because of special or unusual circumstances including, but not limited to . . . overweight/obesity or lack of physical fitness." 7A Dep't of Def., DOD 000 7000.14-R, *Financial Management Regulation: Military Pay Policy and Procedures – Active Duty and Reserve Pay* § 090503(M)(6) (May 2003) ("*FMR*"). Both the statute and the regulation are clear that only the service member's voluntary decision to separate from the military justify recoupment. The regulation further clarifies that separation for reasons of weight or lack of fitness are voluntary only if the service member applies for separation on that basis.

Despite the plain language of both the statute and the regulation, the government has sought to recoup the enlistment bonuses of petitioners, all of whom were involuntarily discharged by the military because they were deemed overweight or unfit. To justify this conduct, the government relies solely on affidavits prepared for this litigation that attempt to relate two internal memoranda by Assistant Defense Secretaries to the statute and regulation at issue. In accepting the government's position and holding that "[t]he Korb memo is a regulation entitled to the force and effect of law," Pet. App. 11a n.11, the Court of Appeals adopted an interpretation that contravenes the plain meaning of the statute and the regulations, in conflict with decisions of this Court and the United States Court of Appeals for the Tenth Circuit. It is imperative that this Court resolve these important issues of federal law that affect thousands of service members.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS MISREAD THE STATUTE, CREATING A CONFLICT BETWEEN THE CIRCUITS, AND FAILED TO DEFER TO THE GOVERNING REGULATION.

The statutory language governing this case is plain: a service member "who *voluntarily*, or because of his misconduct, does not complete the term of enlistment for which a bonus was paid to him . . . shall refund" a portion of the bonus proportional to the unexpired term of the enlistment. 37 U.S.C. § 308(d)(1) (emphasis added). The language of 37 U.S.C. § 308a(b) (1998) (repealed 2000) is identical in relevant part. Under the statutes, the government may recoup enlistment or reenlistment bonuses only if the member has voluntarily failed to complete his or her term of service, or has committed misconduct. Petitioners were all involuntarily separated from the armed forces, as the government has stipulated. Pet. App. 19a. Thus, none of them voluntarily failed to complete the term of service. As the court below noted, its contrary conclusion conflicts with that of the Tenth Circuit in *Iliff* v. *Schlessinger*, 539 F.2d 1275 (10th Cir. 1976). Pet. App. 19a-20a n.18.

The Court of Appeals held that the term "voluntary" in the statute could encompass petitioners' failure to complete their terms of service because "the underlying reasons prompting separation relate to acts of volition." Pet. App. 20a. However, the statute is clear that the word "voluntarily" refers to the failure to complete the term of service itself, and not to underlying conduct. Further, it is undisputed that petitioners made diligent, good-faith efforts to comply with weight and fitness requirements. They were not discharged because they chose not to meet the requirements; rather, they were discharged because *despite* performing all the "acts of volition" required by the services' remedial programs, the results of those acts did not meet military standards.

Even if the statute were ambiguous, "provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor," and Congress is presumed to be familiar with this canon of interpretation when it drafts legislation. *King* v. *St. Vincent's Hosp.*, 502 U.S. 215, 220-21 n.9 (1991). The *King* presumption reinforces the conclusion that only a voluntary decision not to complete the term of service, or misconduct, can justify recoupment.

Leaving aside the statute's plain language, the Court of Appeals' application of *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) to this case was fundamentally misguided: instead of deferring to the Department's clearly worded regulation, as *Chevron* requires in cases of statutory ambiguity, the court instead relied on to affidavits prepared for litigation and outdated, internal agency memoranda that were not available to petitioners or the public until this litigation began.

Defense Department Financial Management Regulation 090503 states that for bonus recoupment purposes, "the term 'who voluntarily or because of misconduct' includes (but is not limited to) members separated . . . upon the application and interest of the member because of special or unusual circumstances including, but not limited to . . . overweight/obesity or lack of physical fitness." 7A *FMR* § 090503(M)(6). The regulation is even more specific than the statute: separation for failure to meet weight or fitness requirements is only "voluntar[y]" if the member applies for the separation. Under *Chevron*, if the Court of Appeals was correct in finding the statute to be ambiguous, it was bound by this "permissible construction of the statute." 467 U.S. at 843.

The court below acknowledged that "[t]he Secretary of Defense is granted explicit authority to implement these provisions through regulations, and has done so." Pet. App.

8a.[2] The court justified its disregard of this explicit regulatory language with its comment that "by themselves the regulations are insufficient," *id.* at 20a. Instead of relying on the clear language of the regulation, the court turned to a "package" of materials and practices, "all knit together by the affidavit of Col. Little." *Id.* at 21a. There is no need for *post hoc* affidavits to make sense of the regulation, which clearly addresses petitioners' situation. Nor was the court's heavy reliance on litigation affidavits appropriate. *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 212-13 (1988).

More important, the affidavits and memoranda on which the Court of Appeals relied flatly contradict the regulation rather than clarifying it. It is well established that an administrative interpretation is not controlling if "it is plainly erroneous or inconsistent with the regulation." *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945); *see, e.g.*, *Shalala* v. *Guernsey Mem'l Hosp.*, 514 U.S. 87, 109 (1995) (O'Connor, J., dissenting) ("And, contrary to the Secretary's argument, [the interpretive rule] cannot be a valid 'interpretation' of the Medicare regulations because it is clearly at odds with the meaning of [the relevant regulation] itself."); *Massachusetts Fair Share* v. *Law Enforcement Assistance Admin.*, 758 F.2d 708, 711 (D.C. Cir. 1985) ("It has long been settled that a federal agency must adhere firmly

---

[2] This recognition that Congress designated *regulation*-making authority underlines the implausibility of the court's argument that the regulations merely "codifie[d]" the intent that the court read into the internal memoranda. Pet. App. 16a. It is clear, and the court below recognized, that the Department of Defense issued the regulations that were drafted by the Defense Finance and Accounting Service, *id.* at 13a; those are the official, public regulations of the Department. Whatever unspoken policies the Department meant to incorporate in the regulation, the language of the issued regulation is effective until the agency publicly rescinds or replaces it and, in the case of rescission, provides a reasoned explanation. *Motor Vehicles Mfrs. Ass'n of the U.S., Inc.* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41-42 (1983).

to self-adopted rules by which the interests of others are to be regulated.").

The Department's rules clearly state that a voluntary separation for weight or fitness reasons is one that the service member requests. Petitioners were not voluntarily separated.

II. THE DECISION BELOW THAT AN UNPUBLISHED INTERNAL MEMORANDUM HAS THE FORCE AND EFFECT OF LAW CONFLICTS WITH THIS COURT'S PRECEDENT.

The court's analysis of the statute and regulation, wrong on its own terms, is predicated on a ruling that conflicts with decisions of this Court and indeed fundamental principles of due process: namely, that a secret internal memorandum has "the force and effect of law." Pet App. 11a n.11. The most basic requirement of due process is that the law be made public. If laws are secret, the rule of law degenerates into the rule of those who claim to know the law.

> [A] bare resolution, confined in the breast of the legislator, without manifesting itself by some external sign, can never be properly a law. It is requisite that this resolution be notified to the people who are to obey it. . . . [I]t is incumbent on the promulgators to do it in the most public and perspicuous manner; not like Caligula, who . . . wrote his laws in a very small character, and hung them up upon high pillars, the more effectually to ensnare the people.

1 William Blackstone, *Commentaries on the Laws of England* § 2, at 45-46 (photo reprint 1979) (1765). Thus the lawmaker must "enact and publish the law" to make it effective, and due process requires "that 'laws . . . give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.'" *Texaco, Inc.* v. *Short*, 454 U.S. 516, 532, 535 (1982); *accord Wright* v. *Georgia*, 373 U.S. 284, 293 (1963) (holding that due process

forbade conviction for violating park rule where "neither the existence nor the posting of any such rule has been proved"); cf. *Torres* v. *INS*, 144 F.3d 472, 474 (7th Cir. 1998) ("The idea of secret laws is repugnant. People cannot comply with laws the existence of which is concealed.").

It is fundamentally unfair for the Department to lead service members to believe that a statute or regulation states its interpretation of an issue, only to deprive them of their property (the bonuses) later, on the claim that a secret internal policy represents its true position. *Morton* v. *Ruiz*, 415 U.S. 199, 236-37 (1974); *Vigil* v. *Andrus*, 667 F.2d 931, 938 (10th Cir. 1982) ("we think the [agency] cannot rely on a 'semisecret,' and perhaps tentative, understanding reached months earlier"). The government may not force parties "to litigate with agencies on the basis of secret laws." *United States* v. *Alaska*, 503 U.S. 569, 591 (1992) (internal quotation marks omitted).

The court below held that secret, unpublished memoranda had the "force and effect of law" required to deprive petitioners of their bonuses. The government applies the policies embodied in those memoranda to thousands of enlistees and reenlistees every year. Far more than most citizens, service members must rely on the government's good faith in matters of pay and benefits. The Department betrays that trust when its policies contradict governing statutes and regulations.

III. ENTITLEMENT TO ENLISTMENT AND REENLISTMENT BONUSES IS AN IMPORTANT ISSUE AFFECTING THOUSANDS OF SERVICE MEMBERS.

The importance of enlistment and reenlistment bonuses as a military recruiting tool cannot be disputed. In the late 1990s, the Army, Navy and Air Force began to experience significant recruiting shortfalls and problems retaining certain skilled personnel. Prominent among the responses to these

problems was a significant expansion of enlistment and reenlistment bonus programs. U.S. GAO, GAO/NSAID-00-146, *Military Personnel: Services Need to Assess Efforts to Meet Recruiting Goals and Cut Attrition* 5 (June 2000) ("*Recruiting Report*"). Thus, from 1995 to 1999, expenditures on enlistment bonuses increased more than eightfold (in constant year 2000 dollars) from $21.7 million to $177 million. *Id.* at 7, 9, 11, 13. Similarly, between 1997 and 2002, the cost of the reenlistment bonus program more than tripled from $235 million to an estimated $789 million. U.S. GAO, GAO-03-149, *Military Personnel: Management and Oversight of Selective Reenlistment Bonus Program Needs Improvement* 1 (Nov. 2002) ("*Reenlistment Report*"). Some 59,000 individuals received reenlistment bonuses in 2001. *Id.* at 2.

For individual enlistees, the amounts are substantial: bonuses ranged up to $20,000 for army enlistment bonuses in 2000, *Recruiting Report* at 6, with $3,000 as a typical signing bonus for a high school graduate. Reenlistment bonuses can be as high as $60,000. *Reenlistment Report* at 2. Since basic pay for a high school graduate begins at $13,465 per year, Def. Fin. & Accounting Serv., *2003 Military Pay Rates: Active Duty and Reserve Monthly Drill Pay Tables* (Jan. 1, 2003), *available at* http://www.dfas.mil/money/milpay/pay/01-2003.pdf (updated May 29, 2003), an enlistment bonus forms a significant part of an enlistee's compensation. Further, an enlistee who does not intend to separate from the military has no reason not to spend the enlistment bonus at the time of receipt. Separation from the military alone is a serious financial blow, without the added burden of recoupment.

The outcome of this case will be highly significant not only for the military but for tens of thousands of service members who enlisted in reliance on the bonus programs. In 1994, 25,000 of the military's 176,000 new recruits were discharged

within the first six months of their contracts. U.S. GAO, GAO/NSAID-97-39, *Military Attrition: DOD Could Save Millions by Better Screening Enlisted Personnel* 2 (Jan. 1997). Of those recruits, more than 7,200 were discharged for failure to meet minimum performance criteria. *Id.* at 5. To help address this problem, basic training personnel suggested that recruits be more fully informed of the services' physical training requirements and encouraged to become physically fit before beginning basic training. *Id.* at 5-6. The military is well aware that it is recruiting individuals who are highly unlikely to meet fitness and weight requirements. In turn, those recruits are entitled to know whether and under what circumstances their enlistment bonuses will be forfeit.

The enlistment and reenlistment bonus programs are at the very heart of military recruitment and retention efforts. Of course, any government program should be administered in a lawful manner. But this obligation is especially important when the government undertakes massive commitments on the scale of the enlistment bonus programs. The Department of Defense has chosen to make the bonuses a centerpiece of its recruiting and retention policy. It cannot withdraw from those commitments based on secret policies and rules. The importance of the issues raised, and the conflicts of authority identified above, warrant immediate review by this Court.

CONCLUSION

For all of the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted

BARTON F. STICHMAN
NATIONAL VETERANS LEGAL SERVICES PROGRAM
2001 S Street, N.W.
Washington, DC 20009
(202) 265-8305

STEPHEN B. KINNAIRD*
TANYA Y. BARTUCZ
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Amicus Curiae

* Counsel of Record

July 7, 2003

(4)

Supreme Court, U.S.
FILED
JUL 22 2003
OFFICE OF THE CLERK

No. 02-1466

IN THE

Supreme Court of the United States

BERTRAND R. FAVREAU, II, *ET AL.*,

Petitioners,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITIONERS' REPLY

MICHAEL A. FELDMAN
14 Lincoln Street
Brunswick, ME 04011
(207) 729-2660

SCOTT L. NELSON
Counsel of Record
BRIAN WOLFMAN
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street, N.W.
Washington, D.C. 20009
(202) 588-7724

Attorneys for Petitioners

July 2003

16 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii
PETITIONERS' REPLY 1
CONCLUSION 10

TABLE OF AUTHORITIES

Page(s)

CASES

Barnhart v. Sigmon Coal Co., 534 U.S. 438 (2002) 4

Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945) 6

Crane v. Secretary of Army, 92 F. Supp. 2d 155 (W.D.N.Y. 2000) 6

Fina Oil and Chemical Co. v. Norton, 332 F.3d 672 (D.C. Cir. 2003) 6

Gonzaga University v. Doe, 536 U.S. 273 (2002) 4

Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473 (1981) 4

Heffron v. International Society for Krishna Consciousness, 452 U.S. 640 (1981) 4

Hensala v. Department of the Air Force, 148 F. Supp. 2d 988 (N.D. Cal. 2001) 3

Iliff v. Schlesinger, 539 F.2d 1275 (10th Cir. 1976) 3

King v. St. Vincent's Hospital, 502 U.S. 215 (1991) 4

Morton v. Ruiz, 415 U.S. 199 (1974) 7

Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc., 526 U.S. 344 (1999) 4

Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981) 4

Ranger Cellular v. FCC, __ F.3d __, 2003 WL 21495159 (D.C. Cir. July 1, 2003) 8

Schumacher v. Aldridge, 665 F. Supp. 41 (D.D.C. 1987) 8

United States v. Gears, 835 F. Supp. 1093 (N.D. Ind. 1993) 3

Yee v. City of Escondido, 503 U.S. 519 (1992) 8

STATUTES AND REGULATIONS

5 U.S.C. § 552(a) 7

5 U.S.C. § 553 7

10 U.S.C. § 2005(a)(3) 4

37 U.S.C. § 308(d)(1) 1

37 U.S.C. § 309 4

38 U.S.C. § 7432 4

38 U.S.C. § 7458 4

Pub. L. 96-342, § 804, 94 Stat. 1077, 1092 (Sept. 8, 1980) 5

Department of Defense Financial Management Regulation 090503 6

S. Ct. R. 15.2 2

LEGISLATIVE HISTORY

Historical and Statutory Notes to 37 U.S.C. § 308 5

H.R. Rep. No. 93-857 (1974), *reprinted in* 1974 U.S.C.C.A.N. 2974 4

H.R. Rep. No. 99-81 (1985), *reprinted in* 1985 U.S.C.C.A.N. 472 10

S. Rep. No. 82-935 (1951), *reprinted in* 1951 U.S.C.C.A.N. 2464 5

S. Rep. No. 96-850 (1980), *reprinted in* 1980 U.S.C.C.A.N. 2833 5

PETITIONERS' REPLY

The government's insistence that the decision of the Federal Circuit in this case does not merit review rests principally on a reading of the lower courts' opinion that alters that opinion almost beyond recognition. The government suggests that the lower courts merely held that service members who "willfully" failed to comply with weight or fitness requirements may be deemed to have been discharged "voluntarily." And it asserts that the courts reached this conclusion simply by applying normal interpretive techniques to "construe" ambiguous statutory and regulatory language.

What the lower courts actually held, however, is that the Defense Department may treat *all* weight or fitness discharges as "voluntary," regardless of how hard a service member tried to comply with the services' standards. They did so based not on any *construction* of the applicable agency regulation, but on the *substitution* of unpublished memoranda for the terms of the regulation. Although this is the most striking feature of the opinions below, the government virtually ignores it and completely fails to defend it. The brief in opposition cites *not one* precedent that permits elevation of unpublished agency documents over published regulations. Nor does it convincingly reconcile the outcome below with the governing statute or its legislative history. The Court should grant review of this case, which is of great importance to thousands of men and women who served their country in its armed forces, not only to resolve the proper interpretation of the statutes at issue, but also to address the lower courts' extreme departure from basic administrative-law precedents governing review of agency actions by the federal courts.

1. The recoupment statutes require service members who, "voluntarily, or because of [their] misconduct," do not fulfill their service obligation to refund portions of their enlistment and reenlistment bonuses. 37 U.S.C. § 308(d)(1). The government distorts the meaning of the statutes, its own practices, and the record when it contends that a weight or

fitness discharge must be deemed "voluntar[y]" under the statutes because "[t]here is no reason why a service member who willfully engages in conduct (or refrains from conduct) *knowing* that it will result in his separation from the Service ... does not 'voluntarily' fail 'to complete the term of enlistment.'" Govt. Br. 10-11. The government's argument is irrelevant because neither the government's practice of seeking recoupment from discharged service members nor the ruling of the courts below is limited to members whose failure to meet weight or fitness standards is "willful."

As explained in our petition (at 6), and nowhere denied in the government's brief (*see* S. Ct. R. 15.2), it is undisputed that the petitioners were *not* discharged for failing to make a good faith effort to comply with applicable weight or fitness standards. Thus, petitioners did not engage in "willful" conduct "knowing" it would cause them to fail. Indeed, they were not discharged for engaging in (or refraining from) any *conduct* at all, but simply because their otherwise satisfactory efforts to comply with weight or fitness standards *did not ultimately succeed.*[1] Under the government's reasoning, any lawyer who failed a bar exam could be said to have "voluntarily" failed to join the bar because (1) he knew the consequences of failing the exam, and (2) he might have passed if he had studied harder. The government's assertion that any failure to meet the armed forces' rigorous weight and fitness standards is necessarily "voluntary" (and even "willful") merely because "volitional" conduct (for example, eating and exercising) *affects* service members' ability to comply with those standards reflects not only an unreasonable reading of the statute, but also a basic ignorance of human nature.

---

[1] The government's suggestion that it "benefitted" petitioners by not discharging them for "misconduct," Govt. Br. 12 n.7, is downright offensive. There is no possible basis in the record for concluding that they engaged in "misconduct" under the statute. *See* Pet. App. 9a n.9. Indeed, anyone who did is excluded from the plaintiff class. *See* Pet. 7.

2. The government's assertion that there is no disagreement among the courts over the interpretation of the statute is equally untenable. The courts below said that they "respectfully disagree with the court in *Iliff v. Schlessinger*, 539 F.2d 1275 (10th Cir.1976)." Pet. App. 19a-20a, n.18. In contrast to the lower courts here, which accepted the government's argument that the statutory term "voluntarily" is ambiguous, the Tenth Circuit in *Iliff* agreed with the government's assertion there that the ordinary meaning of the term refers to the member's departure from the service, not to whether the conduct that led to the discharge was volitional. *See also* J.A. 525-26 (government brief in *Iliff*). Whatever the factual differences between the cases, they reflect directly opposed views of the meaning of the statute.

The government's assertion (Govt. Br. 14 n.9) that the result below can be reconciled with *United States v. Gears*, 835 F. Supp. 1093 (N.D. Ind. 1993), is also wrong. Although the court there mentioned that the service member had not been warned that his weight problem could lead to discharge, its holding was based on its rejection of the government's theory, adopted by the lower courts in this case, that a discharge is "voluntary" for recoupment purposes whenever it is related to conduct that is "volitional in that it was not caused by disease or physical defect." *Id.* at 1093. Moreover, the government apparently concedes that the interpretation of the statute below is inconsistent with that in *Hensala v. Department of the Air Force*, 148 F. Supp. 2d 988 (N.D. Cal. 2001), for it makes no effort to reconcile them. *See* Govt. Br. 14 n.9. *Hensala*, consistent with *Iliff*, held that a service member's intention to bring about his own discharge is essential to any "voluntary" discharge under the recoupment statutes — a holding that would require a different result in this case.

The government claims that these divergent results in the district courts should not affect this Court's decision whether to grant certiorari because district court decisions "have no precedential effect." Govt. Br. 14 n.9. But this Court has of-

ten viewed divergent district court decisions as indicating a need for guidance, especially where important federal statutes or policies are at issue. *See, e.g., Gonzaga University v. Doe*, 536 U.S. 273, 278 & n.2 (2002); *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 349 & n.2 (1999); *King v. St. Vincent's Hospital*, 502 U.S. 215, 218 n.7 (1991); *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 477 n.3 (1981); *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 257 n.14 (1981); *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640, 646 n.9 (1981). As these examples show, the district courts' disagreement with the courts below, coupled with the disagreement between the circuits, reinforces the need for review.

3. The government repeatedly says legislative history supports its view that the statutes require recoupment from service members discharged for weight and fitness reasons. But although the statutory term "voluntarily" may admit some ambiguity at the margins, it cannot be stretched to encompass concededly involuntary discharges of members who, far from seeking to be discharged, have made good faith efforts to remain in the service. Even if the government correctly characterized the legislative history, legislative history cannot alter a statute's unambiguous terms. *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450, 456-62 (2002).

In any event, the government's legislative history argument is wrong. The relevant language has been used repeatedly not only in the statutes at issue, but also in others requiring refunds when members leave the services early. *E.g.*, 10 U.S.C. § 2005(a)(3); 37 U.S.C. § 309; 38 U.S.C. § 7432; 38 U.S.C. § 7458. Congress has referred to this language as "the standard provision for a refund." H.R. Rep. No. 93-857 (1974), *reprinted in* 1974 U.S.C.C.A.N. 2984, 2997. Despite the long history of congressional use of this language, the only support the government offers for its position is a single phrase in a 1951 committee report. That report, discussing a prior version of one of the recoupment statutes, does not ad-

dress weight, fitness or similar involuntary discharges *and does not even purport to interpret the language actually enacted by Congress* — it merely characterizes a communication from the Bureau of the Budget. *See* S. Rep. No. 82-935 (1951), *reprinted in* 1951 U.S.C.C.A.N. 2464, 2466.

Nowhere does the government acknowledge that the *only* legislative history that specifically addresses the issue before the Court is a 1980 Senate report citing the Defense Department's assurance that it was "*not* the intent of this proposal to include situations where an individual is discharged ... because of ... *failure to meet physical standards* or hardship." S. Rep. No. 96-850 at 8 (1980), *reprinted in* 1980 U.S.C.C.A.N. 2833, 2840 (emphasis added). That same year, the very Congress that received that assurance amended and extended the terms of the bonus statutes, which contained the identical recoupment language. *See* Pub. L. 96-342, § 804, 94 Stat. 1077, 1092 (Sept. 8, 1980). Thereafter, Congress repeatedly amended, extended, and reenacted both statutes. *See* Historical and Statutory Notes to 37 U.S.C. § 308. The government points to nothing in the legislative history of these enactments that would contradict the unequivocal statement in the 1980 report that the language was *not* intended to permit recoupment for physical fitness discharges.

Thus, in the half century of congressional use of the "voluntarily, or because of misconduct" standard, the only legislative history that expressly addresses this issue directly contradicts the government's position. Whatever the Congress that first used this language in 1951 may have thought, the evidence as to the intentions of the Congresses that have reenacted it since 1980 — which are the only ones whose intentions are relevant in this case — points in one direction only: toward petitioners' common-sense reading of the statute. The government's brief in opposition not only fails to account for this embarrassing fact; it fails even to address it.

4. Consistent with the statute's limitation of recoupment to discharges that are "voluntar[y]" or because of "miscon-

duct," the Defense Department's published Financial Management Regulations (FMRs) provide for recoupment in the case of a weight or fitness discharge when the discharge is "upon the application or interest of the member." FMR 090503. Contending that the regulation is "ambiguous" because it does not expressly foreclose recoupment when a weight or fitness discharge is *not* requested by the service member, the government argues that the lower courts' reliance on unpublished agency memoranda and litigation affidavits merely reflects a conventional exercise of deference to an agency's construction of its own ambiguous regulation.[2]

The government, however, is unable to explain how a construction that requires recoupment for *all* weight and fitness discharges — thus dispensing altogether with (and rendering entirely superfluous) the phrase "upon the application or interest of the member" — could possibly be a permissible "construction" of any "ambiguity" in the relevant FMR. *See Fina Oil and Chemical Co. v. Norton*, 332 F.3d 672, 678 (D.C. Cir. 2003) (rejecting agency construction of regulation that rendered critical language superfluous or meaningless); *see also Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945) (court may not defer to agency construction that is "plainly erroneous or inconsistent with the regulation").

The government attempts to evade this principle by contending that it is the regulation itself that is meaningless because, according to the government, members may not apply for weight or fitness discharges. In fact, service regulations permit members to apply for discharge for any reason. *E.g.*, J.A. 405, 481. But even if they did not formally provide for such *applications*, nothing in them forbids a member to ask for or express an "interest" in receiving such a discharge. Indeed, in *Crane v. Secretary of Army*, 92 F. Supp. 2d 155 (W.D.N.Y. 2000), the *government* argued that a service

---

[2] Of course, the agency's regulatory construction, even if proper, could not prevail over the unambiguous language of the statute.

member had *requested* that the basis for his discharge be changed to failure to meet weight standards — which would be impossible if, as the government now contends, members were forbidden to request such discharges in any fashion.

5. Most critically, the government's brief in opposition ignores that neither the decision below nor the Defense Department's recoupment policy even purports to reflect a "construction" of the *published* regulation. Rather, the lower courts accepted the government's argument that the *unpublished* Korb and Jehn memoranda are themselves regulations that prevail over the terms of the published regulation, which, according to the Defense Department, unaccountably fails to reflect accurately the intent of the memoranda as a result of an "apparent oversight." Govt. C.A. Br. 11.

As detailed in the petition for certiorari, the proposition, advanced by the government and accepted by the Federal Circuit below, that individuals may be adversely affected by the terms of unpublished regulations is contrary both to a federal statute (5 U.S.C. § 552(a)) and to this Court's holding in *Morton v. Ruiz*, 415 U.S. 199 (1974). *The government's brief in opposition offers no response at all on this point.*

The closest the government comes to addressing this issue is to say that the Korb and Jehn memoranda were not required to undergo notice-and-comment rulemaking under 5 U.S.C. § 553 — a point petitioners have acknowledged. *Compare* Govt. Br. 20-21 n.15 *with* Pet. 17. But § 553's requirement that *some* rules be put out for public comment before they are *issued* is wholly separate from § 552(a)'s requirement that *any* rule that adversely affects a member of the public be published before it is *applied*. The government points to no legal principle that would excuse the Korb and Jehn memoranda from this basic administrative-law precept.[3]

---

[3] The government concedes the memoranda were unpublished but says they were not "secret" because *one* was cited in the FMR's bibliography. But the government itself was not aware of the memo's contents

(*Footnote continued*)

Indeed, the government's brief in opposition is bereft of citation to any authority of any kind for what the Federal Circuit did in this case: namely, subordinate a published agency regulation to substantially different unpublished memoranda. Even the government admits that the published regulation "inartfully" reflects the unpublished memoranda (Govt. Br. 19, n.12) — a considerable understatement, to say the least. But the government cites not a single precedent that permits the terms of unpublished, internal agency memoranda to displace those of published regulations whenever the regulations are "inartfully" drawn. As one court has put it, "[a]lthough Congress gave the Secretary discretion in adopting appropriate regulations, it assuredly did not license the Secretary to publish one set of criteria and to apply another." *Schumacher v. Aldridge*, 665 F. Supp. 41, 53 (D.D.C. 1987).[4]

6. The government denies that the lower courts' decision granted *Chevron-Mead* deference to an interpretation set forth only in litigation affidavits. Govt. Br. 16 n.10. But the courts did just that. The opinion below makes clear that the

---

until this case. J.A. 384. Its bare citation did not make its contents public and thus did not satisfy § 552(a) as to it, let alone as to the other one.

[4] The government also has no answer to the points that the published FMR was promulgated by the Under Secretary of Defense (who is not a subordinate of the long-departed Assistant Secretaries whose memoranda the government claims have the force of law) and that the FMR expressly supersedes *all* prior directives, which includes the memoranda. The government's claim that the "supersession argument" was not timely raised (Govt. Br. 19 n.13) is absurd. Throughout this litigation, petitioners have claimed that the published regulation governs. The argument that it expressly supersedes all other directives is additional support for that claim, not an issue requiring separate preservation. *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992). Moreover, the government's view that a party's failure to raise an argument can justify a court in applying a superseded regulation is erroneous. As Judge Ginsburg of the D.C. Circuit recently observed, applying the wrong law because of a party's waiver would lead the courts to "til[t] at a non-existent windmill." *Ranger Cellular v. FCC*, __ F.3d __, __, 2003 WL 21495159 (D.C. Cir. July 1, 2003).

courts considered *both* the published FMR *and* the unpublished Korb and Jehn memoranda too ambiguous to support the position taken by the agency. Pet. App. 20a-21a. Only by considering the agency's affidavits were the courts able to discern the agency's view (Pet. App. 21a), to which they then proceeded to defer — not as a construction of the agency's own regulation, but as a construction of the governing *statute* under *Chevron* and *Mead*. Pet. App. 21a-22a.

Tellingly, not even the government is willing to argue that granting *Chevron-Mead* deference to such materials is proper and or to deny that doing so would conflict with decisions of other circuits. *See* Govt. Br. 16-17 n.10; *see also* Pet. 19 (citing authority refusing deference to such materials). Thus, once the government's unconvincing denial that the lower courts afforded deference to these materials is set aside, it has no further defense to offer on this point.

7. In a final attempt to deny that this case merits review, the government lamely asserts that the Department of Defense has "advised" that it "plans to revise the FMR" to conform to its view of the statute. Govt. Br. 21. Of course, the Department has had ample opportunity to revise its regulation since being alerted by this litigation to the FMR's "inartful" expression of the Department's position, but, astonishingly, the Department repromulgated the FMR unchanged in 2002 (*after* the decision of the Court of Federal Claims). The Department's belated resolution to clean up its act only when faced with a petition for certiorari is hardly reassuring.

In any case, revision of the regulation will not alter the fact that the Department's recoupment practices are incompatible with the statutes, and it will do nothing to resolve the disagreement among the lower courts over the proper interpretation of the statutes. Nor will it rectify the impropriety, under the *existing* FMR as well as the statutes, of the Department's recoupment of bonuses from the thousands of members of this class. And, perhaps most significantly, amendment of the regulation will have no effect on the im-

portance of reviewing and correcting the precedent set by the Federal Circuit in this case, which sharply departs from established administrative law principles in giving unpublished memoranda precedence over published regulations and affording *Chevron-Mead* deference to internal and litigation-generated agency materials.

CONCLUSION

Through bonus payments, the government induced petitioners and thousands like them to join or remain in the armed forces, knowing that the bonuses were critical to providing them "the means to place a down payment on a home, to pay tuition bills, or to make necessary family purchases." H.R. Rep. No. 99-81, at 230 (May 10, 1985), *reprinted in* 1985 U.S.C.C.A.N. 472, 505. Despite their willingness to serve, their undoubted ability to serve usefully in many capacities, and their efforts to meet the services' physical standards, the services then not only expelled them, but sought to reach into their pockets on the fiction that they quit "voluntarily." The proper treatment of these thousands of former service members, as well as the correct reading of the statutes and the application of fundamental principles of administrative law, are important matters that this case presents for resolution by this Court.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Michael A. Feldman
14 Lincoln Street
Brunswick, ME 04011
(207) 729-2660

Scott L. Nelson
Counsel of Record
Brian Wolfman
Public Citizen Litigation Group
1600 20th Street, N.W.
Washington, D.C. 20009
(202) 588-1000

Attorneys for Petitioners

July 2003

(5)

Supreme Court, U.S.
FILED
SEP 22 2003
OFFICE OF THE CLERK

No. 02-1466

IN THE

Supreme Court of the United States

BERTRAND R. FAVREAU, II, *ET AL.*,

Petitioners,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITIONERS' SUPPLEMENTAL BRIEF

MICHAEL A. FELDMAN
14 Lincoln Street
Brunswick, ME 04011
(207) 729-2660

SCOTT L. NELSON
Counsel of Record
BRIAN WOLFMAN
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street, N.W.
Washington, D.C. 20009
(202) 588-7724

Attorneys for Petitioners

September 2003

5 pp

PETITIONERS' SUPPLEMENTAL BRIEF

Petitioners submit this supplemental brief to alert this Court to the Ninth Circuit's decision in *Hensala v. Department of the Air Force*, __ F.3d __, 2003 WL 22128924 (9th Cir. Sept. 12, 2003).[1] *Hensala* is relevant to this case in two important respects. *First*, it reveals that the Defense Department continues to take wildly inconsistent positions on the meaning of "voluntary" separation for recoupment purposes. *Second*, the Ninth Circuit's opinion rests on a construction of the statutory language that directly conflicts with that of the Federal Circuit and the Court of Federal Claims in this case.

The issue in *Hensala* was the propriety of recoupment from an Air Force doctor discharged for violating the "Don't Ask, Don't Tell" policy by revealing his homosexuality. The district court upheld the recoupment, but only because it concluded that the Air Force had properly determined that the doctor *intended* to bring about his own discharge, and, thus, his separation was "voluntary." *Hensala v. Department of the Air Force*, 148 F. Supp. 2d 988 (N.D. Cal. 2001). Petitioners cited the district court decision in their Petition for Certiorari (at 14-15), and pointed out that the interpretation of voluntariness applied there was flatly at odds with that of the lower courts in this case and would require a different result if applied to petitioners' weight and fitness discharges. In its Brief in Opposition, the government did not contest that the district court's reading of the statutory language was in conflict with that of the courts in this case.[2] Instead, it argued that a district

---

[1] The Ninth Circuit's slip opinion is also available on the court's website, at www.ca9.uscourts.gov/ca9/newopinions.nsf/C8A550ADC8E01D0C88256D9E007B7B0B/$file/0116791.pdf?openelement.

[2] *Hensala* involved 10 U.S.C. § 2005(a), which governs recoupment of educational payments and uses precisely the same operative language ("voluntarily or because of misconduct") as the statutes at issue in this case. The government's Brief in Opposition contained no suggestion that this identical language addressing the same subject should be interpreted differently under § 2005(a) than under the statutes at issue here.

court opinion with "no precedential effect ... establish[ed] no conflict warranting review by this Court." Govt. Br. 14 n.9. The government did not inform the Court that the case was then on appeal, nor did it disclose to the Court the very different position it took on "voluntariness" in that appeal.

The Ninth Circuit has now affirmed the district court's decision in part and reversed it in part. On the issue of "voluntary" separation, the Ninth Circuit's opinion makes clear that the Defense Department in *Hensala* applied a construction of voluntariness that cannot be squared with the position the government has taken in this case. The Ninth Circuit explained that the Defense Department's position with respect to the "voluntariness" of a "Don't Ask, Don't Tell" separation is that, although such a separation obviously rests on a volitional act by the service member (namely, a voluntary statement that he or she is homosexual), the separation itself is voluntary only if the service member intended to bring the separation about by making the statement. This interpretation, the court stated, was set forth in a memorandum by Deputy Defense Secretary Deutch in 1994, and has been applied by the Defense Department to "Don't Ask, Don't Tell" discharges since that time. Slip op. at 13593. As a result, according to the Ninth Circuit opinion, the Defense Department's recoupment policy permits service members "an opportunity to present evidence as to the question of intent to separate" (slip op. at 13599), and no recoupment is permitted if such intent is not present. Indeed, the court reported that of 28 Air Force discharges under the "Don't Ask, Don't Tell" policy, five involved no recoupment, as a result of the Air Force's "individualized determinations with respect to each service member's intent to separate." Slip op. at 13600.

The policy applied and advocated by the Defense Department in *Hensala* is wholly inconsistent with the interpretation of "voluntary" separation that the Department has advanced in this case. A member's voluntary revelation of his or her sexual orientation is much more obviously "volitional"

than a member's failure, despite good faith effort, to lose weight or achieve physical fitness objectives. Nonetheless, the government contends that a failure to meet weight or fitness standards despite good-faith effort makes the resulting discharge voluntary despite the service member's desire to serve, while a "Don't Ask, Don't Tell" discharge is considered voluntary only if accompanied by a purpose to seek discharge. The government's position in *Hensala* thus makes a mockery of its assertions in this case that it has consistently applied a rational construction of the statutory language that supports recoupment from petitioners.

Even more importantly, the Ninth Circuit in *Hensala* expressly adopted and applied a construction of the statutory voluntariness standard that directly conflicts with the lower courts' interpretation of the same language in this case. The plaintiff in *Hensala* contended that the government had violated the statute by applying a "presumption" of voluntary separation and pursuing recoupment against him despite the absence of evidence that he actually intended to bring about his own separation from the service. The Ninth Circuit rejected these contentions, holding that recoupment was permissible under the statute because the evidence supported the Air Force's *individualized determination* that he had disclosed his homosexuality for the *purpose* of bringing about his separation from the service.

The Ninth Circuit's holding thus rested on a reading of the statutory language as permitting recoupment only when a service member's separation is voluntary in the sense that the service member's actual motivation is to leave the service, not merely whenever the separation is the result of some supposedly "volitional" conduct by the service member. That reading of the statutory language is the exact opposite of the one applied by the courts below.

As noted above, the government's only response to petitioners' citation of the *district court's* opinion in *Hensala* was that a conflicting district court opinion was not a basis

for a grant of certiorari. The Ninth Circuit's adoption of the district court's construction of the statutory voluntariness standard lays that argument to rest. The Ninth Circuit's reading of the statutory language in *Hensala* is entirely inconsistent with the lower courts' construction of the identical language in this case. This court should grant certiorari to settle the meaning of these important statutes.[3]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Michael A. Feldman
14 Lincoln Street
Brunswick, ME 04011
(207) 729-2660

Scott L. Nelson
Counsel of Record
Brian Wolfman
Public Citizen Litigation Group
1600 20th Street, N.W.
Washington, D.C. 20009
(202) 588-1000

Attorneys for Petitioners

September 2003

---

[3] In a part of its holding not directly relevant here, the Ninth Circuit went on to hold that the plaintiff should have a chance to pursue, on remand, an Equal Protection claim based on the allegation that the government's recoupment policies with respect to homosexuals discharged under the "Don't Ask, Don't Tell" policy were less favorable than those applied to *heterosexuals* discharged for committing homosexual *acts* in violation of 10 U.S.C. § 925. This issue is not pertinent here, though it is notable that the services actually treat a member discharged under the "Don't Ask, Don't Tell" policy more *favorably* than one discharged for weight and fitness reasons. In the former case, the member has a chance to prove that he did not intend to bring about his discharge, but in the latter case, the government seeks recoupment regardless of whether the member intended and attempted in good faith to remain in the service.